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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re BULLOCK-WEBSTER.

ROYAL EXCHANGE ASSURANCE *v.* ROYAL TRUST OF CANADA.

C A.
1935
June 20.

[1934. B. 3047.]

Revenue—Estate Duty—Property not passing to the Executor as such—Personal property in British Possessions—Estate duty thereon paid by English Executors—Rateable liability of British Possessions—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 9, *sub-ss.* 1, 4; *s.* 20, *sub-ss.* 1, 2.

The right conferred by s. 9, sub-s. 4, on executors who have paid estate duty on property not passing to them as such to be repaid by the trustees or owners of the property the rateable part of the estate duty on the estate, in proportion to the value of the property not passing to them as such, applies to personal property in British Possessions to which s. 20 of the Act applies, notwithstanding the special relief given by s. 20 in respect of the estate duty on any such property. The charge in respect of the rateable part enacted by s. 9, sub-s. 1, is made inapplicable to property in such a British Possession by s. 20, sub-s. 2, but there is nothing in s. 20 to take away the right conferred by s. 9, sub-s. 4.

So held, by Romer and Maugham L.JJ. (the same conclusion in the particular case being reached by Lord Hanworth M.R. on the construction of the particular will), reversing the decision of Farwell J. on this point.

APPEAL from Farwell J.

By her will dated March 7, 1933, Amelia Bullock-Webster

C. A.
1935
BULLOCK-WEBSTER, *In re.*
ROYAL EXCHANGE ASSURANCE *v.* ROYAL TRUST OF CANADA.

appointed the Royal Exchange Assurance (hereinafter called "the Corporation") executor and trustee thereof for the purposes of dealing with all her real and personal estate in the United Kingdom, appointed the Royal Trust Company of Canada executor and trustee for the purpose of dealing with all her real and personal estate in the Dominion of Canada, and appointed certain named persons executors and trustees for the purpose of dealing with all her real and personal estate in New Zealand; and after making certain specific bequests of chattels in England, the testatrix devised and bequeathed all her real and personal estate in or arising in the United Kingdom to the Church of England Incorporated Society for the purpose of providing homes for waifs and strays. The testatrix then devised and bequeathed all her real and personal estate in or arising in the Dominion of Canada and all her real and personal estate in or arising in New Zealand "upon trust that my Canadian trustee and my New Zealand trustees shall respectively sell my said real estate and call in and convert into money such parts of my personal estate as does not consist of money . . . . with power to postpone such sale and conversion for such period as my Canadian trustee and my New Zealand trustees shall respectively think proper and shall out of the money to arise from such sale and conversion and out of my ready money . . . . pay my testamentary expenses death duties and debts and shall invest the residue of the said money in manner hereinafter authorised." The testatrix then declared the beneficial trusts of the part of the trust premises representing the New Zealand property and directed the Canadian trustee to set aside out of the trust premises in Canada investments of the value of $25,000 to be held on the trusts therein mentioned and subject thereto to hold the residue "after payment and setting aside thereout the legacies and sums mentioned in the preceding clauses hereof and paying the duties thereon respectively and on the said chattels personal (in exoneration of the remaining part (if any) of the trust premises)" upon the trusts therein mentioned.

By a codicil dated August 31, 1933, the Public Trustee of

New Zealand was appointed executor and trustee for the purpose of the New Zealand estate in the place of the persons named in the will.

C. A.
1935
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The testatrix died domiciled in England on September 22, 1933, and on February 15, 1934, probate of her will and codicil was granted in England to the Corporation. Probate in respect of the New Zealand estate was granted in New Zealand to the Public Trustee for New Zealand on May 11, 1934. In Canada the English grant was accepted as sufficient.

The Corporation paid out of the estate of the testatrix in the United Kingdom estate duty on personal estate of a total value of 94,597*l.*, made up as follows: English net personal estate 32,541*l.* 12*s.* 1*d.*; Canadian net personal estate 37,405*l.* 11*s.* 7*d.*; and New Zealand net personal estate (estimated) 24,650*l.* Estate duty was calculated at the rate of 19*l.* per cent. There was no real estate in England and Canada, but the real estate in New Zealand was valued at 48,080*l.*

On August 9, 1934, the Corporation took out a summons asking (inter alia): (1.) whether (*a*) the English estate ought to bear the whole of the estate duty properly payable in the United Kingdom in respect of the personal estate of the testatrix wherever situated, after making such deductions as were allowed under s. 20 of the Finance Act, 1894; or (*b*) the English estate ought to bear such part of the United Kingdom estate duty as would be payable in respect of the English estate alone, if duty were charged on that estate at the rate of duty charged in the United Kingdom on the aggregate value of the estate of the testatrix; or (*c*) whether the Canadian and New Zealand estates ought to bear the whole of the United Kingdom estate duty. (2.) Whether (*a*) the debts of the testatrix in the United Kingdom, (*b*) the legacy duty payable in the United Kingdom, and (*c*) the other testamentary expenses ought to be borne by the Canadian and New Zealand estates in exoneration of the English estate.

Farwell J. said that on the construction of the testatrix's will there was no sufficiently clear indication of the testatrix's

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intention that the property, other than the English property, should be burdened with the liability for English testamentary expenses, duties and debts. The direction for payment of testamentary expenses, duties and debts out of the New Zealand and Canadian estates was not intended to include testamentary expenses and debts incurred in this country. It was said, however, that even so the Corporation was entitled to be recouped the amount of extra duty paid in England in respect of the New Zealand and Canadian estates, such a right being given to the English executors by s. 9, sub-s. 4, of the Finance Act, 1894. Sub-s. 1 of that section gave a charge in respect of estate duty paid on property which did not pass to the executors as such, and sub-s. 4 gave them a right to recover the duty paid. Under s. 20 the position was different. That section related to British Possessions, and the effect of s. 20, sub-s. 1, was that the executors who had paid the estate duty in this country on property in a British Possession were entitled to recover from the Commissioners a proper proportion of the duty paid, having regard to the duty paid in the British Possession. Sub-s. 2 provided that nothing in the Act was to be held to create a charge for estate duty on any property in a British Possession. The question was how did s. 9 apply to a case to which s. 20 applied. It was clear that the charge otherwise created by s. 9, sub-s. 1, was not imposed on property in a British Possession. But it seemed to him that s. 20 was a self-contained section dealing with property in a British Possession on which estate duty was payable in this country, and that the relief thereby given was intended to provide the whole relief to which the English executors were entitled in such a case, with the result that s. 9, sub-s. 4, did not apply.

The Church of England Incorporated Society for providing homes for waifs and strays appealed. The appeal was heard on June 20, 1935.

The appeal raised the same points as in the Court below, but the decision that the entire liability for the testamentary expenses, debts and duties in this country was not cast upon the Canadian and New Zealand estates turned entirely on the construction of the testatrix's will and does not call for report.

Fergus Morton K.C. and *Roger Turnbull* for the appellants. The estate duty paid in this country should be borne rateably by the personal property in England, Canada and New Zealand by virtue of the Finance Act, 1894, s. 9, sub-s. 4. Sect. 9, sub-s. 1, gave a charge on property not passing to the executors as such for estate duty paid by the executors, and s. 9, sub-s. 4, gave the executors a right to recover the rateable proportion to be borne by any such property from the trustees or owners of the property. Sect. 20 deals with property in British Possessions, and by sub-s. 1 gives relief by enabling the amount of any duty payable in the British Possession to be deducted from the duty otherwise payable in England; and s. 20, sub-s. 2, provides that there shall be no charge for estate duty on property in a British Possession. There is nothing, however, in s. 20 to prevent s. 9, sub-s. 4, applying in the case of personal property in a British Possession. Farwell J. took the view that s. 20 provided a complete code in regard to property in British Possessions, and that s. 9, sub-s. 4, was therefore not applicable. It is contended that there is no justification for this view: see also s. 20, sub-s. 5.

The same result follows from s. 34, sub-s. 3, of the Administration of Estates Act, 1925, and Sch. I., Part II., which gives the order of application of assets when estates are solvent: see paras. 3 and 6 of Sch. I., Part II.

Sir Gerald Hurst K.C. and *Myles* for the Royal Trust Company of Canada. The direction in the will for payment of "my testamentary expenses death duties and debts" out of the Canadian and New Zealand properties refers only to the testamentary expenses, death duties and debts in those countries respectively. Nor is the position altered by the Finance Act, 1894, under which the clear intention was, as Farwell J. held, to make s. 20 a complete code in respect to the British Possessions, with the result that s. 9, sub-s. 4, has no application. The question in regard to Canadian property is, however, believed to be largely academic, as the relief given by s. 20, sub-s. 1, will, it is anticipated, take away any liability for estate duty in respect of that property.

L. W. Byrne for the Public Trustee of New Zealand. The Administration of Estates Act, 1925, has no application to the present question, because the Act is for domestic application only. In any case liability for estate duty in this country will be small in view of the estate duty charged in New Zealand.

Roger Turnbull replied.

LORD HANWORTH M.R. [after deciding on the construction of the testatrix's will that the burden of the estate duty payable in England and of the English debts and other testamentary expenses in England was not cast upon the Canadian and New Zealand estates in exoneration of the English estate :] The appellant raises the alternative point that, inasmuch as the sum which was paid for estate duty in the United Kingdom was enhanced by being paid in respect of the personal estate in Canada and New Zealand, there ought on the very terms of the will to be attached to the Canadian personalty and to the New Zealand personalty a liability in respect of those parts of the estate duty paid in the United Kingdom which became payable by reason of the personalty existing in those two Dominions. The appellant has in his notice of appeal raised this alternative point in this form : " that it may be declared that upon the true construction of the said will and codicil the English estate ought to bear such part of the United Kingdom estate duty as would be payable in respect of the English estate alone if duty were charged in the United Kingdom on the aggregate value of the estate of the testatrix and that the Canadian estate and New Zealand estate ought to bear the balance of the United Kingdom estate duty in exoneration of the English estate." It is argued with force that although by reason of the terms of the Finance Act, 1894, estate duty has to be paid upon the aggregate of the sums passing on the death wherever situate, yet it is not overlooked in that Act, or indeed in the will, that what is paid in the United Kingdom is an aggregate sum in respect of parts of the estate in different countries, and the Act recognizes clearly the difference between the items of property upon which the duty, as an aggregate, is imposed. More than that, s. 9, sub-s. 1, provides: "A rateable part of the Estate duty on an estate, in proportion to the value of any property which does not pass to the executor as such, shall be a first charge on the property in respect of which duty is leviable. . . ." That clearly recognizes that not all the property on which the estate duty is levied passes to the executor who has to make the payment, and in the present case the personal property in Canada and the personal property in New Zealand did not pass to the executor who had to make the payment of estate duty in this country. Sect. 9 therefore recognizes the distinction of the sources from which there comes a liability to pay estate duty. Sub-s. 4 provides: "If the rateable part of the Estate duty in respect of any property is paid by the executor, it shall where occasion requires be repaid to him by the trustees or owners of the property. . . ." Sect. 20, sub-s. 1, says: "Where the Commissioners are satisfied, that in a British possession to which this section applies, duty is payable by reason of a death in respect of any property situate in such possession and passing on such death, they shall allow a sum equal to the amount of that duty to be deducted from the Estate duty payable in respect of that property on the same death." Sub-s. 2 says: "Nothing in this Act shall be held to create a charge for Estate duty on any property situate in a British possession, while so situate, or to authorise the Commissioners to take any proceedings in a British possession for the recovery of any Estate duty." By Order in Council made under sub-s. 3 the British Possessions in the Dominions of Canada and New Zealand have been brought within s. 20. Sect. 20 therefore gives a right of adjustment by way of repayment to the executors who have paid the estate duty when it is shown that if the full sum originally paid were retained there would be a payment of estate duty on a part of the property both in this country and in a British Possession. To my mind it is not for us at the present moment to determine what the exact adjustment may be of the liability between the three executors of the three parcels of property in respect of which the total of estate duty was paid.

But I turn to consider on this alternative point whether the will does not indicate that the parts of the estate duty paid in the United Kingdom in respect of the Canadian and New Zealand personalty respectively ought to be borne by those portions of the estate. There is a direction in the will for payment out of the money derived from the sale of the respective properties in the two Dominions of "my testamentary expenses death duties and debts." Ought one to say that those words are confined only to the duties directly payable in Canada or in New Zealand by the respective executors of those two Dominions, or are they wide enough to cover the duties that have been paid in the United Kingdom in respect of the property in those two Dominions by the English executor? For my part I think that the direction I have referred to sufficiently indicates that, so far as there has been any estate duty paid whether in the Dominions themselves or elsewhere which was attributable to the properties in Canada and New Zealand, the duty so paid is to be attributed to and is to be charged upon the sums realized under the respective trusts for sale in Canada and in New Zealand.

It is said against that view that there are no words which indicate that there shall be a contribution or recoupment. That is so. But these words make provision for a direct payment of all testamentary expenses, death duties and debts, and they are quite sufficient to carry the liability to repay the sum paid as death duty in the United Kingdom even though it was paid through the agency of the executor of the property in the United Kingdom.

For these reasons it appears to me that the answer on that alternative question ought to be favourable to the appellant and that we ought to that extent to vary the order that has been made by the learned judge.

ROMER L.J. [after concurring with the Master of the Rolls in dismissing the appeal on the first point :] I cannot, with respect to the learned judge, follow him when he decided that the whole of the estate duty properly payable in the United Kingdom in respect of the estate of the testatrix wheresoever situate after making such deductions as are allowable under s. 20 of the Finance Act, 1894, ought to be borne by the English estate in exoneration of the Canadian and New Zealand property. In considering this question I am willing to assume, without expressing any final opinion upon the matter, that the learned judge was right when he held that the words " death duties " contained in the direction in the will to the testatrix's Canadian trustee and New Zealand trustees to pay death duties meant only death duties payable in Canada and New Zealand respectively. On that assumption it follows that the will is silent as to how the estate duty payable in this country is to be borne as between the different parts of the testatrix's estate. The matter would appear to be dealt with first of all by the Finance Act, 1894. Sect. 9, sub-s. 1, of that Act provides that : " A rateable part of the Estate duty on an estate, in proportion to the value of any property which does not pass to the executor as such "—the property in Canada and New Zealand would come within that description—" shall be a first charge on the property in respect of which duty is leviable." By sub-s. 4 it is provided : " If the rateable part of the Estate duty in respect of any property is paid by the executor "—any property there no doubt means " any property not passing to the executor as such "—" it shall where occasion requires be repaid to him by the trustees or owners of the property." When therefore the executor in this country paid estate duty on the aggregate of the testatrix's property wherever situate that section, if it had stood alone, would by sub-s. 1 have entitled the English executor to a charge on the Canadian and New Zealand personal properties respectively for proportionate parts according to the values of the properties of the estate duty paid ; and under sub-s. 4 the English executor would have a personal remedy against the Canadian

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and New Zealand trustees respectively for repayment of the proportionate amounts. That would be the position irrespective of s. 20 of the Act. Sect. 20, sub-s. 1, provides: " Where the Commissioners are satisfied, that in a British possession to which this section applies, duty is payable by reason of a death in respect of any property situate in such possession and passing on such death, they shall allow a sum equal to the amount of that duty to be deducted from the Estate duty payable in respect of that property on the same death." Sub-s. 2 provides: " Nothing in this Act shall be held to create a charge for Estate duty on any property situate in a British possession, while so situate, or to authorise the Commissioners to take any proceedings in a British possession for the recovery of any Estate duty." Farwell J. held that s. 20 was a self-contained section dealing with the particular class of property therein mentioned—namely, property situate in a British Possession, and that the relief given by that section was intended to provide and in fact provided the whole of the relief to which the executor in this country was entitled in respect of property so situated; and he held therefore that the section did not enable s. 9, sub-s. 4, to come into operation. He accordingly directed that the whole of the estate duty payable by the executor in this country should be borne by the estate in this country subject only to the deduction allowed by s. 20. Of course if the estate duties payable in Canada and New Zealand respectively are equal to or in excess of the amounts which would be properly apportionable under s. 9, if s. 9 applied, the result is the same whether s. 9 is treated as applying or not. If, on the other hand, as may well be the case, the duty payable in New Zealand and Canada respectively is less than the duty payable here in respect of those two properties, then the result of Farwell J.'s judgment is to throw the burden of the English duty upon property in this country in exoneration altogether of the properties in Canada and New Zealand. With great respect I cannot think that is right. I see nothing in s. 20 to lead me to the conclusion that so far as regards properties in British Possessions, to which s. 20

applies, s. 9, sub-s. 4, ceases to be applicable. It will have been observed from what I have already read that s. 9 provides two remedies for the executor in this country who has paid estate duty in respect of property abroad. He has a personal remedy under sub-s. 4 and a charge under sub-s. 1. Sect. 20, sub-s. 1, deals only with the amount of English estate duty that will in the end have to be paid in respect of the property situate in British Possessions. Sub-s. 2 does away with the charge for that amount which otherwise the English executor would have possessed under s. 9, sub-s. 1, but it does not in terms purport to take away the personal remedy conferred by s. 9, sub-s. 4. In my opinion the personal remedy given to the English executor under s. 9, sub-s. 4, still remains, and s. 20 does no more than take away in the case of British possessions the charge imposed by s. 9, sub-s. 1. The result will be that the executor in this country having paid estate duty must ascertain how much is properly payable in respect of the property in the British Possessions and can then recover that amount having regard to s. 20, sub-s. 1.

Thus in the present case the executor has to ascertain in regard to the Canadian personal property how much of the total estate duty he has paid in this country is properly payable out of Canadian property, and turning to s. 9, sub-s. 1, he will find that he must ascertain that by reference to the respective value of the properties in Canada, in this country and in New Zealand. Having so ascertained what is payable in respect of the property in Canada for English estate duty he will then ascertain whether any and if so what duty is payable in Canada in respect of the Canadian property. He is then entitled to have that amount deducted from the amount paid or payable in this country in respect of English estate duty on the Canadian property. If the amount that he has paid here is equal to or less than the amount that has been paid in Canada in respect of the Canadian property the result will be that nothing will be paid by Canada in respect of English estate duty, as the deduction of the amount of the duty payable in Canada will wipe out all English

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estate duty payable in respect of the Canadian property. If, on the other hand, the English estate duty payable in respect of the Canadian property so ascertained is in excess of the estate duty payable in Canada, then the balance of the English estate duty payable in respect of the Canadian property will have to be borne by the Canadian property by virtue of s. 9, sub-s. 4, of the Act of 1894. The same result as it seems to me, apart altogether from the Finance Act, 1894, will follow from the Administration of Estates Act, 1925, s. 34, sub-s. 3, and the First Schedule. In the present case assuming that the testatrix's property in each of the three countries has been given specifically, each property so specifically given will have to bear its proportion of the estate duty rateably as the result of s. 34, sub-s. 3, of the Act of 1925 and the provisions in the First Schedule, Part II. The same result I think will follow a fortiori, if I am wrong in the assumption I have made as to the true construction of the will. If the words "death duties" in the material passage in the will mean death duties whether payable in this country or elsewhere, then, as I say, it is an a fortiori case and the Canadian and New Zealand properties would have to bear their proper proportion of the estate duty paid in England.

In my view the right course is to vary the order of Farwell J. What I would suggest is that in lieu of the first declaration made by Farwell J. casting the entire burden of the estate duty paid in this country on the English estate, the Court should declare that the Canadian and New Zealand estates respectively ought to bear a rateable part according to their respective values of the estate duty properly payable in the United Kingdom so far, if at all, as the respective parts to be borne by them should be in excess of any duty to be deducted therefrom under s. 20, sub-s. 1, of the Finance Act, 1894, and that the English estate ought to bear the residue of such estate duty.

MAUGHAM L.J. I am of the same opinion. The will which calls for consideration contains slips or inaccuracies in almost every line, and I cannot conceive that the true construction of the clauses that we have so carefully discussed will afford any clue to any similar case in the future; and inasmuch as on the first question raised in the appeal I am fortunate enough to agree entirely with the judgment of the learned judge in the Court below and with those judgments that have been delivered here, I do not think it is necessary for me to say anything on that part of the case. I will only add something which, I think, has not been expressed in so many words in any of the judgments, although I think my brethren take the same view—namely, that the will in this case contains no residuary clause properly so called. Separate bequests are made of personal estate in the United Kingdom, in Canada, and in New Zealand, with the result that the gift of the residuary estate in the United Kingdom does not refer to a general residue.

I do, however, desire to add a few words on the point on which we are differing from the learned judge in the Court below, the question being one, as I conceive it, of considerable importance. The question may be stated thus: Supposing a person domiciled in this country has disposed of personal estate situate in a British Possession as well as personal estate situate in this country, with the result that to obtain probate in this country estate duty has had to be paid on the aggregate personal estate possessed both in this country and in the British Possession, does s. 9, sub-s. 4, of the Finance Act, 1894, apply so that a rateable part of the estate duty in respect of the property situate in the British Possession has got to be repaid to the executor in this country by the trustees or owners of that property? The argument to the negative to which the learned judge acceded is that, having regard to the fact that by s. 20, sub-s. 2, of the same Act it is provided that "Nothing in the Act shall be held to create a charge for Estate duty on any property situate in a British possession, while so situate," and having regard to the other provisions of s. 20, we find there a code with regard to estate duty paid in this country in respect of personal estate situate in a British Possession and there is, therefore, no room for the application of s. 9, sub-s. 4. It may be useful to mention, though of course the matter is in no sort of doubt, that personal property situate out of the jurisdiction is property which does not pass to the executor as such, that is, does not pass to him qua executor or, to use the House of Lords' phrase, virtute officii. That construction was put upon the words in s. 9, sub-s. 1, in the great case of *O'Grady* v. *Wilmot* (1), which overruled a number of cases decided in other Courts. It is manifest therefore that when the Act of 1894 was passed and an executor became accountable for the personal estate of the deceased domiciled in this country, although that included personal property situate abroad, there was prima facie no reason on the construction of the Act as a whole for changing the incidence of the new tax as between the various beneficiaries who might be entitled to the property of the deceased; and I venture to say that there is nothing in the Act from start to finish which will lead to the conclusion that it was intended so to do. In s. 20, sub-s. 2, there is a provision not that s. 9 is not to apply to property in a British Possession or that sub-ss. 1 and 4 of s. 9 are not to apply or anything about repayment to the executor in this country of a rateable part of the estate duty in respect of property situate in a British possession, but simply that "Nothing in this Act shall be held to create a charge for Estate duty on any property situate in a British possession, while so situate." I cannot help thinking that had it been intended to take away a right of recoupment, words would have been used for the purpose. It may be asked, and I think it was asked in argument, why there is a provision against the creation of a charge for estate duty upon property situate in a British Possession? I think the answer may well be that a charge created by an Imperial Act on personal property situate in a British Possession might lead to great difficulties; and if it is asked why there is nothing prohibiting a charge on property situate in a foreign country, the answer may well be that the draftsman did not think it necessary to say anything about a charge which could not be enforced in that country

(1) [1916] 2 A. C. 231.

so long as the property was there situate, because it is well known that foreign countries do not go out of their way to assist in the enforcement of British revenue laws. However that may be, I rely on the fact that s. 20, sub-s. 2, does nothing more than to provide in effect that sub-s. 1 of s. 9 is not to apply to property situate in a British possession. I would add that it would seem very strange to have a different rule as regards recoupment of a rateable part of the estate duty in respect of property abroad applicable as regards personal property situate, we will say, in Canada, and personal property situate on the other side of the United States border. There is a really sound reason for the provision contained in s. 9, sub-s. 4. If the foreign property and the British property go to different persons, there seems no reason from the point of view of the Legislature for not charging the persons with property abroad or in a colony with "the estate duty payable in respect of that property on the same death." I am there using the concluding words in s. 20, sub-s. 1, which show that the duty payable here, although the English executor has to pay it, is, in the case we are considering, "estate duty payable in respect of" the foreign or colonial property in question. Accordingly, it seems to me that there is upon the true construction of the language contained in the Finance Act, 1894, no sufficient reason for cutting down the plain provisions of s. 9, sub-s. 4, so as to make it inapplicable to a case where the property is situate in a British possession. That is, I think, a sufficient ground for the variation in the Order of the learned judge which my brother Romer has already suggested. It may be, I do not wish to express a decided opinion upon the point, that the very peculiar provision in the will with regard to the payment of testamentary expenses, death duties and debts of the testatrix out of the money to arise from the sales of the property in New Zealand and in Canada respectively, and out of any ready money presumably situate in those countries respectively, is intended to confer the charge which is not conferred by the Finance Act, 1894. Whether that be so or not, I am of opinion that under s. 9, sub-s. 4, there is an obligation to

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repay to the executor in this country a rateable proportion of the estate duty payable in respect of the properties situate in Canada and New Zealand respectively. It is possible that the decision here relates only to an academic question, but it is quite clear there may be cases where the question will be of great importance. Thus, for many years past, the Bahamas has been a fortunate country where two per cent. is the highest rate of estate duty charged in respect of property, whilst in this country the duty runs up to either forty per cent. cr fifty per cent. ; and the advantage gained by s. 20, sub-s. 1, of recoupment in that particular case would be a very small mitigation of the wind to the shorn lamb.

For the reasons given I agree with the proposed Order mentioned by my brother Romer.

Appeal allowed on this point.

Solicitors for appellants : *Lee & Pembertons.*

Solicitors for plaintiffs and the Royal Trust Co. of Canada : *Peacock & Goddard, for Mooring, Aldridge & Haydon, Bournemouth.*

Solicitors for Public Trustee of New Zealand : *Mackrell, Maton, Godlee & Quincey.*

H. C. G.

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In re NAUTILUS STEAM SHIPPING COMPANY, LIMITED.

Ex parte GIBBS & CO.

[No. 00602 of 1931.]

Insurance—Third Party Risks—Insured Company—Liquidation—Third Parties (Rights against Insurers) Act, 1930 (20 & 21 *Geo.* 5, *c.* 25), *s.* 1*—Liability incurred before passing of Act—Liquidation after Act.*

The Third Parties (Rights against Insurers) Act, 1930, s. 1, sub-s. 1, provides: "Where under any contract of insurance a person (hereinafter referred to as the insured) is insured against liabilities to third parties which he may incur, then—(*a*) in the event of the insured becoming bankrupt or making a composition or arrangement with his creditors; or (*b*) in the case of the insured being a company, in the event of a winding-up order being made, or a resolution for a voluntary winding-up being passed, with respect to the company . . . . if, either before or after that event, any such liability as aforesaid is incurred by the insured, his rights against the insurer under the contract in respect of the liability shall, notwithstanding anything in any Act or rule of law to the contrary, be transferred to and vest in the third party to whom the liability was so incurred":—

On September 21, 1925, a policy of insurance was taken out by a company insuring it against third-party risks. On October 6, 1925, an accident to a third party occurred and the insurers thereupon became liable to the company in respect of the accident. On July 10, 1930, the Third Parties (Rights against Insurers) Act, 1930, came into operation. On October 13, 1931, an order was made for the compulsory winding up of the company.

On a summons taken out by the third party in the winding up of the company asking to be subrogated to the rights of the company against the insurers, Bennett J., holding himself bound by *Ward* v. *British Oak Insurance Co.* [1932] 1 K. B. 392, refused the application:—

Held (reversing the decision of Bennett J.), that the winding up of the company having supervened after the Act of 1930 came into operation, s. 1 of that Act became operative and enured to transfer the benefit of the policy of insurance from the company to the third party.

Ward v. *British Oak Insurance Co.* [1932] 1 K. B. 392 distinguished on the ground that in that case the winding up of the company took place before the Act of 1930 came into operation.

APPEAL from a decision of Bennett J. on a summons taken out in the liquidation of the Nautilus Steam Shipping

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Co., Ld., by Gibbs & Co. (a firm) asking (inter alia) for a declaration that the applicants were entitled as against the liquidator on payment to the owner of the sailing ship *Dharma* of such sums as had been or should be found to be payable to the said owner for damages and costs awarded or to be awarded in certain litigation in the republic of Chile in respect of a collision between the steamship *Pear Branch*, of which the company were the owners, and the sailing ship *Dharma*, to be subrogated to the rights of the owner of the sailing ship *Dharma* against the underwriters and/or insurers under the provisions of the Third Parties (Rights against Insurers) Act, 1930.

The following statement of facts is taken from the judgment of Lord Hanworth M.R. On September 21, 1925, a policy of insurance was entered into insuring the insured company against claims by third parties, and it was a policy which covered the period in which a liability arose. On October 6, 1925, a collision took place between a vessel, the *Pear Branch* belonging to the Nautilus Steam Shipping Company and a vessel called the *Dharma*. The *Pear Branch* went into Valparaiso after the collision and proceedings in rem were threatened by the owner of the *Dharma* under the Admiralty jurisdiction there prevailing. In order to prevent the *Pear Branch* from being detained there was a bond entered into on behalf of the company by Messrs. Gibbs & Co., the well-known firm in Chile and Argentina. The liability which arose in the matter of damage to the *Dharma* was ultimately determined at 6200*l.* That was determined in 1928 and Messrs. Gibbs & Co. in accordance with their bond paid that sum and they were reimbursed by the insurance company. But that did not exhaust the possible liability of the colliding vessel to the owner of the *Dharma*, and a claim was made for loss of profits which might have been earned by the *Dharma* owing to her being disabled by the collision from being placed under charter. That claim has not yet been finally determined. The matter has been litigated and in the Chilean Courts apparently has gone from one Court to the Court of Appeal and is still under consideration. On

October 13, 1931, a compulsory order to wind up the Nautilus Steam Shipping Company was made and the proceedings which are before us in respect of which Bennett J. gave judgment were for the purpose of obtaining a declaration as to what were the rights of Messrs. Gibbs & Co. in respect of any sum which might be payable under the policy of insurance as moneys due to third parties under the contract of insurance entered into between the Nautilus Shipping Co., the owners of the *Pear Branch* and their insurers. Two dates must be remembered; one is the date of the collision, which was some time ago, October 6, 1925, and the other the date on which there was a compulsory order made to wind up the company, on October 13, 1931. (1)

Bennett J., holding himself bound by *Ward* v. *British Oak Insurance Co.* (2), refused to make the declaration asked for on the ground that the liability of the insurers to the Nautilus Steam Shipping Co. arose before the Act of 1930 came into operation.

Gibbs & Co. appealed. The appeal was heard on June 21, 1935.

Lionel Cohen K.C., *W. N. Stable K.C.* and *G. Avgherinos* for the appellants. The question on this appeal arises with reference to a claim for damages for loss of profits. We are not now pressing the question of equitable assignment. We accept Bennett J.'s ruling on that point. The question now is as to the subrogation of the appellants to the rights of the owner of the *Dharma* against the owners of the *Pear Branch* under the Third Parties (Rights against Insurers) Act, 1930, s. 1, on payment by the appellants of what may be found to be due from them. We admit that the Act is not retrospective. The only point is whether the Act applies where the liquidation occurs after the Act has come into operation. Sub-s. 2 of s. 1 of the Act is unambiguous. The only thing to look at is whether the order there referred to

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(1) The petition was presented and the winding up of the company accordingly commenced on August 10, 1931, but for the purposes of the present appeal the actual date of the winding up was not material.

(2) [1932] 1 K. B. 392.

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was after the Act. Sub-ss. 1 and 2 must be construed alike. Bennett J. held himself bound by *Ward* v. *British Oak Insurance Co.* (1) That case, however, is distinguishable on the ground that there the winding up took place before the Act of 1930 came into operation.

It is, it is submitted, immaterial when the liability arose, whether before or after the Act came into operation.

The arguments of Mr. Lamb in *Ward's* case (2) were the same as those we urge in the present case, except that he did not refer to sub-s. 2 of s. 1 of the Act.

[They also referred to *In re Harrington Motor Co. Ex parte Chaplin.* (3)]

Spens K.C. and *R. J. T. Gibson* for the liquidator of the Nautilus Company. The company having gone into liquidation the liquidator is entitled to collect the insurance moneys on behalf of the creditors of the company: *In re Harrington Motor Co.* (3)

The question here is one between the liquidator and Gibbs & Co. The latter are asking to be subrogated to the rights of the owner of the *Dharma.*

The insurers are not before the Court and the Court is being asked to make a prospective order.

In *Ward* v. *British Oak Insurance Co.* (1) the question was a pure question of the construction of s. 1 of the Act and had nothing to do with whether the Act was or was not restropective. Here the question is whether or not the liability was incurred before the Act came into operation. In s. 1 of the Act the words " which he may have incurred " do not occur. The section, it is submitted, is looking to liabilities to be incurred after the Act comes into operation. The Act applies only where both the liability and the winding up occurred after the Act came into operation.

Sub-s. 2 of the Act does not assist the Court in the construction of sub-s. 1.

We rely on the fact that there is no express reference in s. 1 to past liability. It refers only to liability which may be incurred in the future.

(1) [1932] 1 K. B. 392.

(2) Ibid. 393.

(3) [1928] Ch. 105.

Lord Hanworth M.R. This appeal must be allowed. It raises a very interesting point and a point undoubtedly of some importance. The facts are these. [His Lordship stated the facts as above set out and continued:] This question of the rights of third parties to receive the insurance moneys which accrued under a policy of insurance to the insured persons who were liable to the third parties has raised questions from time to time. In *In re Harrington Motor Co.* (1) the applicant recovered judgment for damages and costs in an action against a limited company for personal injuries caused to him by the negligence of one of its servants. Before execution could be levied the company went into liquidation, and the insurance company with which the company in liquidation was insured against third-party risks paid the amount of the damages and costs to the liquidator. Now, the reason why that sum was payable at all to the liquidator as representing the insured company was because there had been a liability declared in favour of the third party for personal injuries which he, the third party, had suffered. Not unnaturally he thought that inasmuch as that sum had been paid by the insurers to their insured, the company which was liable to him for personal injuries, it would be fit and proper that the money so received by the insured company should be paid over to him. But it had to be held in that case that the money which was paid by the insurance company was paid by them under the contract of insurance which obtained between the insurance company and the company which had caused the injuries to the third party. Inasmuch as the liquidation had supervened the money which was paid over to the liquidator was general assets in the hands of the liquidator and could not be earmarked or paid over to the third party who had been insured, but remained assets in the hands of the liquidator for general distribution amongst the creditors of the company. The judgments in that case pointed out that that position was an unsatisfactory one and that in certain legislation—such as the Workmen's

(1) [1928] Ch. 105.

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Compensation Act (1)—steps had been taken to give the injured party a definite and direct right to receive moneys which were receivable by the person who was insured and who had received in respect of the injuries moneys with which to defray his own liability.

Upon that the Third Parties (Rights against Insurers) Act, 1930, was passed, and it received the Royal assent on July 10, 1930. Sect. 1, sub-s. 1, provides: "Where under any contract of insurance a person (hereinafter referred to as the insured) is insured against liabilities to third parties which he may incur" then certain results are to follow. Those opening words to my mind connote a declaration of a nexus between the person who is insured and his insurers. The section refers to what may be called a state of insurance between the insured and the insurers. So long as no loss is incurred the relationship between the insured and the insurers is one which continues the nexus between the parties, but which is merely indicated by the steady and regular payment of premiums. It does not follow that there is any money which shall be received under the policy; it merely declares that there is a state of insurance existing between the insured and the insurers.

Now when that state of insurance so exists, the Act provides for two events: "If . . . . any such liability as aforesaid [that is a liability to third parties] is incurred by the insured, his rights against the insurer under the contract in respect of the liability shall, notwithstanding anything in any Act or rule of law to the contrary, be transferred to and vest in the third party to whom the liability was so incurred." The events which are contemplated are the event of the insured person becoming bankrupt, or in the case of a company of the company going into liquidation. I put the words in the shortest possible form and leave out words like "composition" or "making arrangements" and the other words in relation to a company. So that we have a direct liability, or, rather, the rights of the insured person against his insurer are transferred to and vest in the third party to whom the liability was so incurred. Here, of course, there was a liability incurred though not yet quantified by the collision in 1925. The liquidation of the Nautilus Steam Shipping Company and the appointment of the liquidator, who is respondent to this appeal, took place after the Act was in operation.

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(1) See Workmen's Compensation Act, 1925, s. 7.

The question of the interpretation to be put upon this Act came before the other Division of the Court of Appeal in *Ward* v. *British Oak Insurance Co.* (1), and it was held that the section was not retrospective so as to affect cases in which the liability had been incurred before July 10, 1930, when the Act came into operation. The basis of that decision, which is stated somewhat broadly, was this. The writ in the action had been issued on February 22, 1928, before the Act was in operation, and the liquidation became effective in 1927.

Bearing in mind *In re Harrington Motor Co.* (2), what was the position upon those facts? It was this, that although there was a contract of insurance, inasmuch as there had been a voluntary winding-up of the company liable to the third party and a liquidator had been appointed, the position was one which was comparable to the issue which had been determined in *In re Harrington Motor Co.* (2) There was a right which had accrued to the liquidator to receive the moneys which were payable in respect of the damages payable to the third party and, as Greer L.J. puts it (3), " One of the assets of the company was the liability of the respondents to pay the amount of the insurance. That was an asset divisible among the creditors, notwithstanding that the amount which it might provide for any particular creditor might be small." That being the existing position, the Third Parties (Rights against Insurers) Act, 1930, was then passed, and Greer L.J. points out that: " It is clear from the dates that if that Act transferred to the appellant the right to recover from the respondents it could only do so by depriving the creditors of James & Clark, Ld., of a right which had already accrued to them. There are numerous

(1) [1932] 1 K. B. 392.
(2) [1928] Ch. 105.
(3) [1932] 1 K. B. 392, 398.

cases which clearly show that the Courts lean against so interpreting an Act as to deprive a party of an accrued right." Slesser L.J. refers to certain passages in the judgment in *In re Harrington Motor Co.* (1)

But in the present case although there was a possible liability in damages there was not any order for liquidation until October 13, 1931, some months after the Third Parties (Rights against Insurers) Act was in operation. When one turns to s. 1 the words which I have already read seem to me to deal with a situation which is different from that which had to be dealt with in *Ward's* case (2), but cover a case where there is a liquidation after the Act had come into operation. Let me read two sentences again of s. 1: "Where under any contract of insurance a person . . . . is insured against liabilities to third parties which he may incur," then, in the event of bankruptcy or liquidation, "if, either before or after that event, any such liability as aforesaid is incurred by the insured" that must mean "has been or is or shall be incurred," because in dealing with a case before the event of bankruptcy the word "is" is necessarily inappropriate if it is to connote the existing moment of time. Something that had taken place before the event of bankruptcy and before the event of liquidation can be only introduced by giving a wide interpretation and meaning to that word "is."

It appears to me, therefore, that this Act was intended as and when after its passing there was a bankruptcy or a liquidation and a question arose whether or not the sum payable by the insurers was to be handed over to the trustee in bankruptcy or the liquidator in the liquidation for the general benefit of the creditors to give to the third party in respect of his rights against the insured—in respect of the liability that the insured has incurred to him, the third party—a right to have the insured's rights against the insurers transferred to and vested in him. It appears to me, therefore, that upon the facts of the present case, the liquidation supervening after the Act was in operation, there is a clear distinction from the *Ward* case (2), and that when

(1) [1928] Ch. 105, 113.

(2) [1932] 1 K. B. 392.

one considers carefully s. 1 and interprets its somewhat imperfect language, the section must be held to be operative and to enure to transfer the benefit of the policy from the insured to the third party.

It has been said and was said in *Ward's* case (1) that one must look very carefully to see that one is not taking away by an Act of Parliament rights which have already accrued unless it can be found in very clear terms that that was the intention. Slesser L.J. refers to that and says (2): " In my opinion the wording is not clear enough to escape from the rule that vested interests are not intended to be interfered with by legislation, except when that intention is expressed in clear words." What did he mean by " vested interests " ? There is a well known decision of Sir George Jessel M.R. (3), who had to deal with a point which is not dissimilar under s. 10 of the Judicature Act of 1875, which directs that in the winding up of a company whose assets may prove insufficient for payment of debts the same rules shall be observed as may be enforced under the law of bankruptcy. The question was whether under those terms the Act was retrospective or not. Sir George Jessel held that in a case where a supervision order had been made before the commencement of the Act to secure creditors, although their claims had not been ascertained they were entitled to prove for the full amount of their debts without deducting the value of their securities, and he decided it upon the general rule that where the Legislature alters the rights of parties by taking away or conferring any right of action its enactments, unless in express terms they apply to pending actions, do not affect them. Then he refers as an exception to the case of procedure.

This, of course, as in that case, was not a question of procedure. But in the present case the creditors with their rights did not exist until the order was made for the winding up of the company. It was then and then only that they became entitled to have their aliquot part of the assets of the company distributed to them on a basis of equality. That

(1) [1932] 1 K. B. 392.

(2) Ibid. 400.

(3) *In re Joseph Suche & Co., Ld.* (1875) 1 Ch. D. 48.

right accrued to them on October 13, 1931, and not before. They might have had what has been expressed in the course of the argument to be some hopes, although they cannot actually have had any hopes, being creditors of the company, that the company should be put into liquidation. But as creditors their rights have to be determined not earlier than October 13, 1931, and at that date this statute had become operative to say what is to happen in respect of the sum payable by the insurers to the insured arising out of a liability of the insured to the third party.

To my mind the case is different from that of *Ward* v. *British Oak Insurance Co.* (1) by which the learned judge below felt himself to be bound, and for these reasons the appeal ought to be allowed.

ROMER L.J. I have come to the same conclusion. Bennett J. felt in the circumstances, having regard to certain observations which had fallen from members of the Court in the case to which the Master of the Rolls has referred, *Ward* v. *British Oak Insurance Co.* (1), that it would be more respectful on his part to dismiss the summons of Messrs. Gibbs & Co. without expressing any view of his own on the matter. *Ward* v. *British Oak Insurance Co.* (1) was a case in which, as the Master of the Rolls has pointed out, the insured company had gone into liquidation before ever the Act came into force. The question was whether in those circumstances the Act had any operation upon the affairs of that company. To use the words of Lindley L.J. in giving judgment in *Lauri* v. *Renad* (2): "It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction."

Now, to have held that the Act applied to a liquidation commenced before the Act came into force would have been indeed to hold that the Act had a retrospective operation. The members of the Court of Appeal in that case had to consider whether the language of the Act was such as plainly to require such a construction. Scrutton L.J. and Slesser L.J. in particular, called attention to the fact that throughout s. 1, words of futurity seemed to be implied by the Legislature. That perhaps enabled them to arrive at the conclusion that the language of the section was certainly not such as to require them to give a retrospective effect to the Act. The Court did not consider and did not express any view as to the true construction of the section in relation to its operation in the case of a liquidation begun after the Act came into force. As I said just now, to hold that the Act applied in the case of a liquidation commenced before the Act came into force would be to give a retrospective action to the statute. To hold that, in the case of a liquidation begun after the Act came into force, it relates to liabilities of the company insured incurred before the Act comes into force, is in no way to give a retrospective effect to the statute.

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(1) [1932] 1 K. B. 392.

(2) [1892] 3 Ch. 402, 421.

To use an illustration which was employed by Mr. Cohen in the course of his argument, if a statute enacts that in the case of a person dying intestate his property shall be distributed in a particular way, it is indeed to give a retrospective effect to the Act to say that it applies in the case of a person who dies before the Act comes into force. But to hold that in the case of a person who dies after the Act comes into force his property, whether acquired before or after the Act comes into force, is to be distributed in manner directed by the Act, is in no sense to give a retrospective effect to the Act. The language of the statute might of course be such as to raise a question of construction as to what property it refers to, and I agree with Mr. Spens that the Act with which we are now concerned does give rise to a question, and a serious question, of construction whether it does apply, in the case of a company entering into liquidation after the Act comes into force, to liabilities which arose before the Act was passed. I therefore am entitled to treat this case as a question of construction, and construction only.

Sect. 1, sub-s. 1, of the Act, begins as follows: " Where under any contract of insurance a person (hereinafter referred to as the insured) is insured against liabilities to third parties which he may incur." It is perfectly plain that the word "is" there does not mean at the date of the Act. To so hold would be to prevent the Act applying to any insurance effected after the Act came into force. Plainly that word "is" refers to the state of affairs existing at the happening of the events which are immediately afterwards mentioned under letters (*a*) and (*b*) to which I need not refer. The sub-section must therefore be read as follows: "Where under any contract of insurance a person at the happening of the events next hereinafter mentioned is insured against liabilities to third parties which he may incur." There prima facie it means "which he may incur after the happening of the event." But then we come to these words—"if, either before or after that event, any such liability as aforesaid is incurred by the insured"—that shows at once that the words "which he may incur" must be read as "which he may incur or may have incurred." So I approach this section almost from the beginning with the knowledge that when the Legislature is using words of futurity it does not necessarily mean to refer to future events.

The words which cause the trouble in the present case are those to which I have just referred: "If, either before or after that event, any such liability as aforesaid is incurred by the insured." The question we have to determine is, does that mean if either then or at a later date the insured is under such liability, or does it mean that the liability must be incurred after the Act comes into operation? Guided by the fact which I have already discussed, that the Legislature when using words of apparent futurity means to include events which have happened in the past, I have no difficulty at all in saying that these words "is incurred by the insured" mean is incurred at or after the date of the happening of that event, or has been previously incurred whether before or after the coming into operation of the Act. I am encouraged to do so by the fact that it is plain this Act was passed to remedy the hardships that had been involved on third parties by the decision of this Court in *In re Harrington*

Motor Co. (1), and also by the fact that to put any other construction upon the words "is incurred" would be to lay down that where the insured is a company, the third party is in a much worse position than if the insured is an individual who subsequently dies insolvent, whose case is dealt with by sub-s. 2 of s. 1, in words that make it plain that in such a case a liability already incurred at the date of the passing of the Act is a liability which is covered by the sub-section.

For these reasons I agree that this appeal should be allowed.

MAUGHAM L.J. I am of the same opinion and will shortly express my reasons. The question which arises is, I think, one which depends solely on the true construction of s. 1, sub-s. 1, of the Third Parties (Rights against Insurers) Act, 1930. The only material dates at present are these. On September 21, 1925, there was a policy of insurance taken out by the company now in liquidation. On October 6, 1925, there was an accident, as a result of which the insurers came under a liability to the company in respect of an accident to a third party. On July 10, 1930, the Act in question came into operation. The liquidation commenced on August 10, 1931, the date when the petition to wind up was presented. The whole question is this, whether on those facts prima facie the third party is entitled to the benefits conferred by s. 1 of the Act in question. The dates which existed in *Ward* v. *British Oak Insurance Co.* (2), were quite different inasmuch as there the winding up had commenced before the Act came into force.

Now it is plain that there would be the greatest possible objection to construing such an Act as this one as applying to a company—I need not deal with bankruptcies for the present purpose—of which the winding-up had commenced before the Act in question came into force. Under the Companies Act, 1929, s. 383, it was expressly provided that the provisions of the Act with respect to winding-up should not apply to any company of which the winding-up had commenced before the

(1) [1928] Ch. 105.

(2) [1932] 1 K. B. 392.

commencement of the Act; and, indeed, but for such a provision, either express or implied, there would be the very greatest difficulty in a bankruptcy or winding-up which had commenced and as to which the rules and regulations were altered as from a date subsequent to the commencement and before the completion of the winding-up. Accordingly there was, as I think, the strongest possible reason for the decision in *Ward* v. *British Oak Insurance Co.* (1), a decision not only binding on us but which we all agree was undoubtedly right. In that case it might well be said that the claim which failed was a claim that s. 1, sub-s. 1, of the Act in question was retrospective; and for the reasons given in the judgments of the learned judges the argument that it was retrospective failed.

In the present case, as my brothers have pointed out, there is no question, and I may add that Mr. Spens frankly enough admitted it, whether the section is retrospective in any proper sense or not. The question on the true construction of the Act is simply this: Whether it can fairly be implied that the accident must take place after the Act comes into force. The hardship or mischief to provide for which the Act was passed is obviously just as great if the accident takes place before or after July 10, 1930. The section cannot be applicable if the liquidation or a bankruptcy has already commenced, but there is nothing in the Act which clearly points to the fact that the accident must be one which takes place after the commencement of the Act. I need not repeat what has already been said by my brethren with regard to that.

I will only add this, that to my mind the real question depends upon the true meaning of the words in sub-s. 1 of s. 1, beginning with the words " if, either before or after that event, any such liability as aforesaid is incurred by the insured." The difficulty which is at first sight caused by the words " is incurred " is I think removed by the circumstance that if you consider that the liability is in reference to something which happened " either before or after that event " so that the word " is " must by necessary construction be construed as meaning "has been" or "is." If you place that construction upon the section, in my opinion the whole of the difficulties which were urged upon us by Mr. Spens disappear and we have a section which may properly be held applicable to cases where the accident in question occurs either before or after the Act comes into force.

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(1) [1932] 1 K. B. 392.

I would only add this, that under the present policy the liability strictly does not arise upon the accident happening, for the liability in strictness applies if the assured becomes not only liable to pay but shall in fact have paid by way of damages certain sums in question. But for the construction which we have seen our way to put upon the Act, there might be considerable difficulty in treating the Act as intelligible in reference to such a case as we have before us.

For the reasons given by my brethren and for these reasons I think the appeal must be allowed. The form of the order may require a word of consideration.

Appeal allowed.

Solicitors for appellants: *Johnson, Jecks & Colclough.*

Solicitors for respondent: *Middleton, Lewis & Clarke, for Middleton & Co., Sunderland.*

W. I. C.

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July 16, 17.

STUART v. HAUGHLEY PAROCHIAL CHURCH COUNCIL.

[1934. S. 1698.]

Parochial church council—Electoral roll—Removal of name—Appeal to lay electoral commission—Order for restoration of name to roll—Non-compliance—Enforcement of order—Jurisdiction—Representation of the Laity Measure, 1929.

A parishioner whose name was removed by the parochial church council from the electoral roll of a parish appealed to the lay electoral commission, the appellate tribunal constituted under r. 18 of the Schedule to the Representation of the Laity Measure, 1929. The commission, after obtaining from the council their reasons in writing for the removal of the name, directed that the name should be restored to the roll. The council failed to comply with this direction, and the parishioner whose name had been removed commenced an action in which he sought an order directing the council to restore his name to the roll and an injunction restraining the council from preventing him from attending and voting at church parochial meetings:—

Held, that the commission had duly come to a decision and in doing so had acted in no way contrary to natural justice. The name of the plaintiff must therefore be restored to the roll and he was entitled to the injunction asked for.

Decision of Bennett J. [1935] Ch. 452 affirmed.

APPEAL from a decision of Bennett J. (1)

The facts, which are fully stated in the report of the case before Bennett J. (1), are briefly as follows:—

The plaintiff, Edmund Cuthbert Stuart, whose name had been removed from the church electoral roll of the parish of Haughley, in Suffolk, brought proceedings against the parochial church council, the vicar, the Rev. Walter Grange White, the secretary (at all material times) of the council and the present secretary of the council for (1.) a declaration that he was entitled to have his name reinstated on the roll; (2.) an order directing the council and/or the present secretary of the council to reinstate the plaintiff's name on the roll; and (3.) an injunction restraining the defendants and each of them from restraining or in any way interfering with the plaintiff's attending and voting at church parochial meetings of the parish or exercising any other rights or privileges vested in him as a person whose name was entered on the roll.

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(1) [1935] Ch. 452.

Before the year 1932 the plaintiff's name was on the electoral roll of the parish of Haughley, and in the revision which took place of that roll by the defendant council in January, 1932, his name was removed from it. In the same month he and other persons whose names had been removed from the electoral roll gave notice of appeal to the rural dean of Stow, in accordance with r. 18 of the Schedule to the Representation of the Laity Measure, 1929. The lay commissioners entrusted to determine the matter were Mr. Singleton Cooper and two others, and Mr. Singleton Cooper wrote on February 9, 1932, to the secretary of the parochial church council asking for the council's reason for removing the names. After some delay and correspondence a letter dated March 8, 1932, was received from the secretary of the council saying: "As secretary of the parochial church council I am directed to inform you of the following proposition that was passed by the council last evening, March 7. That the names of [*sic*] the ten persons removed from the electoral roll at the last revision, neither attend worship or [*sic*] support the parish church, and that any further correspondence will not be entered into by the parochial church council."

Thereupon the lay electoral commission held a meeting on March 23, 1932, at which the commission decided that it could see no reason for removing the names from the roll, and in accordance with his instructions Mr. Singleton Cooper wrote: "Haughley Electoral Roll. We have considered your letter but we can see no justification for removing the names of the appellants from the electoral roll without having first obtained their consent. If you feel it desirable that these names should be removed from the roll the best course of action is to see the people concerned and get their consent to the removal of their names or else you must produce conclusive evidence that they are members of a religious body not in communion with the Church of England. If you are not prepared to do this please reinstate all the names at once and let me have a certificate to the effect that this has been done."

Notwithstanding the intervention of the Bishop of the diocese, the council declined to give any further reasons in writing for having removed the plaintiff's name from the roll and persisted in their refusal to reinstate his name; and the Bishop ultimately appointed the Rural Dean of Stow to put into effect the decision of the commission. Accordingly on September 20, 1932, the Rural Dean posted up on the door of the church of the parish of Haughley a supplementary roll containing the names of those who had appealed, including the name of the plaintiff. That supplementary roll was taken down by some unknown person. The plaintiff's name was not restored to the electoral roll at the revision in January, 1933. The plaintiff attended the parochial meeting early in 1933, but was told that he ought not to be there. In 1934 he again sought to attend a meeting, but was refused admission by a steward or two stewards and a police constable. The plaintiff thereupon brought this action.

Bennett J. held that the commission in coming to their decision had acted honestly and in good faith and that the Court had no jurisdiction to interfere with that decision; that the name of the plaintiff must be restored to the roll and must be granted the injunction asked for.

The parochial church council and the vicar appealed.

Michael Hoare for the appellants.

Hon. S. O. Henn Collins K.C. and *W. T. Elverston* for the plaintiff were not called upon.

LORD HANWORTH M.R. This appeal fails. It is a case in which I really should desire to say no more than that I agree with Bennett J.'s decision and to adopt it; and I should like to leave it at that, but that might seem a little unsympathetic and unappreciative of Mr. Hoare's argument. He has put the matter very fully and very ably before us, and I should add very fairly; therefore I will say a few more words, but they shall be as few as possible, because it is quite plain that underlying the legal interests of the parties there has been a certain amount of feeling in this parish, and that this litigation has arisen out of misunderstandings and distrust as well as complete lack of appreciation of the legal rights of the parties.

The action is brought by the plaintiff to establish his right to be restored to the electoral roll of his parish. The parochial church council dispute that right and claim that the plaintiff is no longer entitled to be put upon the electoral roll. The defendant Mr. White, the vicar of the parish, has made, it is true, some admissions as to what he did; but he does contend that by reason of what has happened he has not acted wrongly, and he joins in the view that the plaintiff was not entitled to be present or to vote at any meeting on the ground that his name was not entered on the electoral roll of the parish.

We have read the letters with a good deal of care. They start in this way. The plaintiff was on the electoral roll of the parish, and in order to be put upon it he had to make a declaration as to qualification, and the like, which in fact he did make on January 7, 1930. He thereupon was placed upon the roll. It is the duty of the parochial church council to make up the roll at certain times, but we start with the fact that the plaintiff was upon the roll. For reasons which at the time they thought good and sufficient, the parochial church council, in 1932, thought they would remove the names of certain persons from the electoral roll, and one of those persons was the plaintiff. The plaintiff was aggrieved by this action. By r. 18 of the rules in the Schedule to the Representation of the Laity Measure, 1929, it is provided, by sub-cl. 1, that " there shall be a right of appeal by any person aggrieved against—(*a*) any enrolment, or refusal of enrolment, on the roll of a parish; (*b*) the removal of any name, or the refusal to remove any name, from the roll of a parish"; and that notice of appeal shall be given to the Rural Dean. Then it is provided by sub-cl. 3 that " A lay electoral commission shall be constituted in each diocese by the diocesan conference, and any appeal shall be considered and decided

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by such two or more members of the commission as the commission shall appoint, and their decision shall be final." Mr. Stuart gave the proper notice and brought his case properly before the lay electoral commission, and the commission, which, according to the evidence, was properly constituted, had the matter before them, and we have had their minutes. They wrote to the parochial church council pointing out that it was necessary for them to establish their right to remove the name of Mr. Stuart. I think that course was proper, because when once a person is upon the electoral roll, which means that he has fulfilled the qualifications which are laid down in r. 3, he is entitled to remain on unless good cause is shown to the contrary. Romer L.J. points out to me that sub-r. 6 of r. 3 provides: "The names of persons who have ceased to be entitled to be upon the roll of a parish, or who have signified in writing their desire that their names shall be removed from the roll, may, subject to the provisions of these rules, be at any time removed from the roll by or under the direction of the Council." It is quite impossible to contend that it was not the duty of the parochial church council to prove as a fact that those persons whom the parochial church council had taken off had ceased to be entitled to be upon the roll of the parish. When that information was asked for, the answer was somewhat indefinite, and ultimately a further request was made on February 12 in these terms: "It is not fair to the people in question to keep them waiting for a considerable time and therefore I must ask you to be good enough to let me have at your early convenience the reasons for the action of your Council." That is written by Mr. Singleton Cooper, who was acting secretary for the commission. The answer to that was: "I cannot comply with your request until the Church Parochial Council have met." To that the answer is made that the council must meet without delay and deal with the matter, and on March 8 a letter was sent by the secretary of the parochial church council, saying: "That the names of the ten persons removed from the electoral roll at the last revision, neither attend worship or support the parish church, and that any further correspondence will not be entered into by the parochial church council." It appears to me that upon the receipt of that letter the lay electoral commission were entitled to infer that the parochial church council had determined not to provide any more information, and that they were relying upon the facts stated—namely, that the ten persons did not attend worship or support the parish church, both of them quite insufficient reasons to justify the removal of their names from the electoral roll. So the matter rested; but on March 24, after a meeting of the lay electoral commission, the secretary to the commission writes: "We have considered your letters but we can see no justification for removing the names of the appellants from the electoral roll without having first obtained their consent. If you feel it desirable that these names should be removed from the roll the best course of action is to see the people concerned and get their consent to the removal of their names or else you must produce conclusive evidence that they are members of a religious body not in communion with the Church of England. If you are not prepared to do this please reinstate all the names at once and let me have a certificate to the effect that this has been done." That letter was of course written with a knowledge of the qualifications which entitle a person to be placed on the electoral roll as set out in r. 3. If they have become members of a religious body not in communion with the Church of England, that would be a good ground for removing them from the electoral roll, but no such evidence was either promised or indicated, still less provided. When I turn to the minutes of what had been done by the lay electoral commission, I find that the minutes of the meeting on March 23, the day before that letter was written, state: "Having considered the letters very carefully, the Commission decided that it could see no justification for removing the names of the appellants from the electoral roll without having first obtained their consent. Mr. Cooper was instructed to convey this information to the secretary of the Haughley church council and to say that the council must either get the consent of the appellants to have their names removed from the electoral roll or else produce conclusive evidence that either their names are on the electoral roll of another parish or that they are members of a religious body not in communion with the Church of England. Failing this the Council was to reinstate the names." When that letter was received, no further step was taken; and it is not until May 12 that another letter is written by the secretary of the lay electoral commission to Mr. Harper, the secretary of the parochial church council, as follows: "I am very much surprised I have had no reply to my letter of March 24th. You will see there that I say in the last paragraph 'please reinstate all the names at once and let me have a certificate to the effect that this has been done.' I am now writing to you six weeks afterwards and have heard nothing. This means that you are treating the Bishop's commission with the utmost disrespect, and if I do not hear from you by return that the names of the people concerned have been reinstated I must report the matter to the Bishop."

The contention on the part of the defendants is that this determination, which was communicated on March 24, was not a proper determination at all. Read in its form and in its terms, it seems to be a final decision upon the matter, subject to this, that the order, so to speak, is not to go forward —is to lie in the office, as we should say here—for a time, during which it would have been possible for the council to present to the commission what might have proved to be conclusive evidence that the persons concerned were members of a religious body not in communion with the Church of England. Subject to that condition being fulfilled, the order was a final order. The secretary of the Commission waits for a whole six weeks during which nothing happens, and then calls attention to the fact that the order was intended to be operative and that he must then ask for a certificate that the names have been replaced upon the roll. What happens afterwards is unfortunate. I desire to refer to it as little as possible. Steps were properly taken by the Rural Dean under the direction of the Bishop, the Bishop writes letters which indicate that he is desirous of getting the matter straightened out with the least possible friction, and it is quite obvious that in a matter of this sort his jurisdiction came into play; and he directed the Rural Dean to put up a supplementary notice of reinstatement of these members. Why? Because the parochial church council did not act in accordance with the decision of the lay electoral commission.

I want to leave out all reference to the other unfortunate claims that have been made and the subsequent correspondence in the hope that peace may be restored. I turn back to what is the real point. It is suggested that the lay electoral commission had not heard and determined the matter, and it is said that some outside body, such as a parochial church council, ought to decide whether or not the commission have duly received and considered the materials which the parochial church council thinks they ought to have considered. Why is that so, when a domestic tribunal of this sort is set up and power is given to it to hear and to decide?

Our attention is called to sub-r. 4 of r. 18: "For the purpose of such consideration and decision, the members of the Commission so appointed shall consider all the revelant circumstances, and shall be entitled to inspect all documents and papers relating to the subject-matter of the appeal, and to be furnished with all information respecting the same which they may require." It is for them to determine what are the relevant circumstances: they are given power to inspect the documents and papers relating to the subject-matter of the appeal, and to be furnished with information. This domestic tribunal must act and deal with the matter, and it is rightly entrusted with the powers of exercising its jurisdiction, and it is not subject to scrutiny or to being overruled by some other body who may wish that it had acted in some way differently. The commission are entrusted with making the decision and their decision is to be final; and in the present case there is no ground whatever for charging them with having come to a decision otherwise than bona fide, or on any ground which might justify steps being taken to set aside their conclusion. It is not for us to deal with

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the matter and determine it, and I need say no more about it. It is sufficient to say that upon the facts before us it is quite clear that the commission were entrusted with the decision, that the appeal was rightly brought before them, that it was for them to determine how they would receive and deal with the matter, that they invited information to be given to them which was not forthcoming, and that upon the materials which they had before them, which of course would include the electoral roll and the fact that the plaintiff's name was upon the electoral roll, they came to their determination. A bona fide determination has been come to and it is final for all purposes. In these circumstances there is no ground for saying that the action and decision of the lay electoral commission can be questioned. The learned judge has given effect to it and he is right to do so, and this appeal therefore fails and must be dismissed.

Some suggestion was made that some differentiation ought to be made in the matter of the payment of costs as between the parochial church council and the other defendant, the vicar. We can see no ground for making any such differentiation at all. It was claimed that by reason of admissions which he had made in his evidence he had severed himself and had put his conduct in a different light from that of the parochial church council ; but his contention is that the plaintiff was not entitled to be placed upon the electoral roll. He states in his defence : "That at the annual parochial church meeting held in the said parish on the 22nd January, 1933, this defendant was the chairman of the said meeting and contended that the plaintiff was not entitled to be present at or to vote at such meeting on the ground that his name was not entered on the said electoral roll of the said parish." That arose from a misunderstanding by the vicar of what was the effect of the decision of the lay electoral commission, supported as it was and brought to his notice by the proper church authorities, including the Bishop ; and I cannot help thinking that if he had exercised his influence in favour of obeying the direction of the Bishop rather than in contending that the plaintiff was not entitled to be present a happy ending might have been reached in this unfortunate dispute. In these circumstances the appeal must be dismissed with costs, and we make no special order about those costs.

ROMER L.J. I agree, and have nothing to add.

MAUGHAM L.J. I also agree.

Appeal dismissed.

Solicitors: *Owen White & Catlin; Whites & Co., for Greene & Greene, Bury St. Edmunds.*

H. C. G.

GENERAL COUNCIL OF MEDICAL EDUCATION AND REGISTRATION OF THE UNITED KINGDOM *v.* THE DENTAL BOARD OF THE UNITED KINGDOM.

LUXMOORE J.
1935
May 10;
June 27.

[1935. G. 700.]

Dentist—Registration of Dental Practitioners—General Medical Council—Disciplinary Powers—Delegation to Executive Committee—Erasure of Names from Register—Medical Act, 1858 (21 *&* 22 *Vict. c.* 90)—*Dentists Act,* 1878 (41 *&* 42 *Vict. c.* 33), *ss.* 13, 15—*Dentists Act,* 1921 (11 *&* 12 *Geo.* 5, *c.* 21), *ss.* 6, 8, 16.

Sect. 16, sub-s. 4, of the Dentists Act, 1921, which lays down that for the purpose of the exercise of their functions under the Act and the Dentists Act, 1878, the General Medical Council can act by an executive committee of the Council, including at least one additional member, does not enable them to delegate to any such committee the disciplinary powers over dental practitioners conferred on the General Medical Council by s. 13 of the Dentists Act, 1878, as amended by s. 8 of the Dentists Act, 1921.

The sub-section in question confers power on the General Medical Council to act by an executive committee only in respect of those matters in which the General Medical Council is not required to act itself.

ORIGINATING SUMMONS.

This was an originating summons taken out by the General Council of Medical Education and Registration of the United

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Kingdom (commonly known as the General Medical Council) for the determination of certain questions of construction arising under the Dentists Acts, 1878 and 1921, and the Medical Act, 1858—namely, (1.) Whether on the true construction of the Acts and in particular of s. 16, sub-s. 4 (1), of the Dentists Act, 1921, the plaintiff council for the purpose of the exercise of their functions under s. 8, (2) of the last mentioned Act had power (if they thought fit) to act by

(1) Dentists Act, 1921, s. 16, sub-s. 4: "The General Council shall, for the purpose of the exercise of their functions under the principal Act [Dentists Act, 1878] and this Act, have power to act by an executive committee of the Council, including at least one of the additional members of the Council appointed in pursuance of this section."

(2) Sect. 8, sub-s. 1: "Section thirteen of the principal Act [Dentists Act, 1878] (which provides for erasing from the register the name of a practitioner convicted of crime or guilty of disgraceful conduct) shall be amended as follows:—(*a*) The power conferred on the General Council by the first paragraph thereof shall be exercised by the Board: (*b*) The following shall be substituted for the third paragraph thereof (but not including the proviso to that paragraph):—

"The Board may, and on the application of any medical authority shall, cause an inquiry to be made into the case of a person alleged to be liable to have his name erased under this section, and, if the Board on any such inquiry are satisfied that the name of that person ought to be erased from the register, they shall forward a report to the General Council setting out the facts proved at the inquiry and the finding of the Board.

The General Council, after receiving any such report, and after hearing any observations which the person affected or the medical authority may desire to make with reference to the report, may make an order directing the registrar to erase from the register the name of the person affected.

Provided that the General Council, if they are of opinion that further inquiry into the case is necessary, shall not themselves take any evidence for the purpose, but shall remit the case to the Board for further inquiry and report."

Sub-s. 2: "The power of the General Council under section fourteen of the principal Act to direct the restoration to the register of any name or entry erased therefrom by the Council shall not be exercised except upon a report made to the Council by the Board, and the power to restore to the register any entry which has been erased by the Board shall be exercised by the Board."

Sub-s. 3: "The amount of the fee to be paid on the restoration of any name or other entry to the register shall be such sum not exceeding five pounds as may be prescribed by the Board, and different fees may be prescribed in respect of different matters."

the executive committee in s. 16, sub-s. 4, referred to, or had no such power.

(2.) If the answer to question 1 was that the plaintiff council had power to act as aforesaid by the executive committee, then, whether on the true construction of the said Act such committee must be the executive committee appointed pursuant to s. 9 of the Medical Act, 1858, with one or more of the additional members appointed in pursuance of s. 16, sub-s. 1, of the Dentists Act, 1921, or whether the plaintiff council had power to appoint a special executive committee (including at least one of the said additional members) to exercise the said functions either generally or on any one or more occasions or for any period. (3.) Generally that it might be determined on the true construction of the said Acts what power (if any) the plaintiff council had to delegate their functions under s. 8 of the Dentists Act, 1921.

H. S. Preston K.C. and *D. C. Bartley* for the plaintiffs. The real question in these proceedings concerns the construction of s. 16 of the Dentists Act, 1921, and especially sub-s. 4. (1) On the probably rare occasions when disciplinary action became necessary, it would be very convenient if—having regard to the wide language of the sub-section—the General Council were able to act by an executive committee.

F. K. Archer K.C. and *Wilfrid Hunt* for the defendants. A judicial power cannot be delegated without express provision, and in the absence of express words, a power of delegation cannot be assumed.

H. S. Preston K.C. in reply.

Cur. adv. vult.

June 27. LUXMOORE J. Under the joint operation of the Medical Act, 1858, and the Dentists Acts, 1878 and 1921, the General Council of Medical Education and Registration of the United Kingdom (commonly called the "General Medical Council") is clothed with certain disciplinary powers over dental practitioners, and in particular with the power of

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(1) See note (1) ante, p. 42.

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erasing from the register of dentists the name of any practitioner convicted of certain offences or guilty of infamous or disgraceful conduct in a professional respect.

This summons has been taken out by the General Medical Council, to which I shall refer as the "General Council." Its object is to have determined by the Court the question whether on the true construction of the Acts referred to, the General Council can act by a committee in exercising its disciplinary powers over dental practitioners. If the answer to this question is in the affirmative, a further question is raised with regard to the constitution of the committee.

The General Council was established by the Medical Act, 1858. This Act was passed to regulate the qualification of practitioners in medicine and surgery. It provided for the establishment, keeping, and publication of a general register, to be called the "Medical Register," and imposed on the General Council the duty of appointing a registrar and branch registrars, and conferred on it the power to direct erasure of the name of any medical practitioner from the register in certain specified cases. The Act had no reference to dental practitioners.

On July 22, 1878, the Dentists Act, 1878, was passed to amend the law relating to dentists and dental practitioners. It provided for the establishment and keeping of a new register under the style of the "dentists register." The duty of keeping it was imposed on the general registrar of the General Council. The Act conferred on the General Council disciplinary powers over persons registered in the dentists register similar to those conferred by the Medical Act, 1858, over persons registered in the medical register. The disciplinary powers in respect of persons registered in the dentists register are to be found in s. 13 of the Dentists Act, 1878, which so far as is material is in the following terms :—

Sect. 13: "The General Council shall cause to be erased from the dentists register any entry which has been incorrectly or fraudulently made.

Where a person registered in the dentists register has, either before or after the passing of this Act, and either before or after he is so registered, been convicted either in Her Majesty's dominions or elsewhere of an offence which, if committed in England, would be a felony or misdemeanor, or been guilty of any infamous or disgraceful conduct in a professional respect, that person shall be liable to have his name erased from the register."

Sect. 15 lays down the procedure to be followed in the exercise of these disciplinary powers. It provides that: "The General Council shall for the purpose of exercising in any case the powers of erasing from . . . . the dentists register the name of a person . . . . , ascertain the facts of such case by a committee of their own body, not exceeding five in number, of whom the quorum shall be not less than three, and a report of the Committee shall be conclusive as to the facts for the purpose of the exercise of the said powers by the General Council.

The General Council shall from time to time appoint and shall always maintain a committee for the purposes of this section, and subject to the provisions of this section may from time to time determine the constitution, and the number and tenure of office of the members of the committee."

It seems plain on the true construction of the last mentioned section, (1.) that the function of the committee to be constituted thereunder is to ascertain the facts of any case in which the General Council desires or is called upon to exercise its disciplinary powers under s. 13; (2.) that the function of the General Council is to exercise its disciplinary powers on the conclusions of fact arrived at by the committee; (3.) that there is no power under the 1878 Act enabling the General Council to delegate the exercise of its disciplinary powers to any committee, whether constituted under s. 15 or otherwise. I understand these conclusions have been accepted and invariably acted on by the General Council.

The Dentists Act, 1878, was amended by the Dentists Act, 1921. One of the objects of the last mentioned Act was to provide that the body charged with the control of the registration and qualification of dental practitioners should in the future be so constituted when exercising its statutory powers and duties as to include representatives of the profession, for up to the date of the passing of the 1921 Act there was no statutory provision for the inclusion of any dental practitioner as a member of the General Council or any committee thereof. To attain this object a new body was constituted by the 1921 Act, and incorporated under the name of the "Dental Board of the United Kingdom." I will refer to it hereafter as the "Dental Board." The 1921 Act provides for the appointment of a registrar to perform such duties in connection with the dentists register as the Dental Board might direct. Sect. 6 provides for the transfer to the Dental Board of certain specified powers and duties formerly vested in the General Council, other than the disciplinary powers conferred on the General Council by s. 13 of the 1878 Act. The provisions of s. 13 of the last mentioned Act were amended by s. 8 of the 1921 Act. The amendment provides for the substitution of a new paragraph for the third paragraph of s. 13 of the 1878 Act. The original paragraph conferred on the General Council power to erase the name of any registered dental practitioner convicted of the specified offences or guilty of infamous or disgraceful conduct in a professional respect. The new paragraph in s. 8, sub-s. 1, is para. (*b*), and is in these terms :—

"The Board may, and on the application of any medical authority shall, cause an inquiry to be made into the case of a person alleged to be liable to have his name erased under this section, and, if the Board on any such inquiry are satisfied that the name of that person ought to be erased from the register, they shall forward a report to the General Council setting out the facts proved at the inquiry and the finding of the Board.

The General Council, after receiving any such report, and after hearing any observations which the person affected or the medical authority may desire to make with reference to the report, may make an order directing the registrar to erase from the register the name of the person affected :

Provided that the General Council, if they are of opinion that further inquiry into the case is necessary, shall not themselves take any evidence for the purpose, but shall remit the case to the Board for further inquiry and report."

This paragraph also replaces the provisions of s. 15 of the 1878 Act, which section is expressly repealed by the Second Schedule of the 1921 Act.

The substance of these amendments appears to be the substitution of the Dental Board for the committee constituted under s. 13 of the 1878 Act, but the Dental Board is expressly directed to make a finding on the facts as well as to ascertain them. The finding of the Dental Board on matters of fact is not in the first instance conclusive and binding on the General Council, because express power is conferred on it to refer back to the Dental Board for further inquiry and report any case which the Dental Board has already inquired into and reported upon, if the General Council is of opinion that further inquiry and report is necessary; but there is an express prohibition precluding the General Council from itself taking any evidence in any case falling within s. 13 of the 1878 Act, as amended by s. 8 of the 1921 Act.

If the matter rested here, it would, I think, be reasonably clear that the actual exercise of the disciplinary powers over dental practitioners convicted of the specified offences or guilty of infamous or disgraceful conduct in a professional respect is left where it was placed by the 1878 Act in the General Council. Sect. 16 of the 1921 Act, however, provides by sub-s. 1 that the General Council shall, for the purpose of the exercise of its functions under the 1878 and 1921 Acts, consist of " the ordinary members of the Council and of three additional members to be appointed by the Privy Council " but no person shall be qualified to be appointed as an additional member of the General Council unless he is (*a*) a member of the Dental Board and (*b*) registered in the dentists register as a graduate or licentiate in dental surgery or dentistry. Sub-s. 4 of s. 16 is in these terms:—" The General Council shall, for the purpose of the exercise of their functions under the principal Act and this Act, have power to act by an executive committee of the Council, including at least one of the additional members of the Council appointed in pursuance of this section."

Apart from this sub-section there is nothing in either of the Acts to suggest that the Council can delegate its disciplinary powers over dental practitioners to a committee. Indeed apart from sub-s. 4, it seems clear that the General Council alone could act in those matters when reinforced by three additional members selected from the Dental Board and appointed by the Privy Council for that purpose. It is quite true that sub-s. 4, if considered by itself, is in its terms wide enough to admit of the construction that the General Council may delegate all its powers and duties under the Acts of 1878 and 1921 to an executive committee as there provided, for the words are: " The General Council shall, for the purpose of the exercise of their functions under the principal Act and this Act, have power to act by an executive committee. . . . ." But if it is so construed, it is difficult to see what was the object of sub-s. 1. The same phrase " for the purpose of the exercise of its functions under the principal Act and this Act " is used in connection with the constitution of the General Council for the particular purpose. It would be a strange result if the order of the General Council erasing a name from the dentists register could be made by a committee, of which the quorum might be the three members of the Dental Board, which is itself precluded from delegating the preliminary inquiry to any committee of that board. (See the proviso to cl. 9 of the First Schedule to the 1921 Act.)

Having regard to the object with which the 1921 Act was passed and to the position before its passing, I think sub-s. 4 of s. 16 ought not to be construed in the widest sense of the words used in it, but as conferring power on the General Council to act by an executive committee only in respect of those matters in which the General Council is not required to act itself. For I think sub-s. 1 of s. 16 would to a large extent be redundant unless it is construed as applying to those cases in which, apart from the 1921 Act, the Genera

Council had itself been required to act. The Act of 1921 was not, I think, passed in order to alter this requirement but to ensure that the dentists' profession was adequately represented on the General Council when acting in its disciplinary capacity.

It was argued on behalf of the General Council that it would be convenient if it was entitled to act in disciplinary matters by a committee and that time and expense would thereby be saved. This argument has really no bearing on the case. The disciplinary powers conferred on the General Council are of the highest importance, not only to the individual but to the profession generally, and I am satisfied that no amendment of the 1878 Act should be construed as altering the plain provisions of that Act requiring the decision of the General Council on disciplinary matters unless the intention is expressed in language equally clear and explicit.

For the reasons I have endeavoured to state, I am of opinion that on the true construction of the 1878 and 1921 Acts, the General Council cannot act by a committee in exercising the disciplinary powers of the Acts over dental practitioners. I therefore answer the first question in the negative. The second question does not arise. The third question is in the nature of a general interrogatory, but I think I have already answered it, for I have held that the General Council have no power to delegate its functions under s. 13 of the 1878 Act as amended by s. 8 of the 1921 Act.

Solicitors: *Waterhouse & Co.*

A. R. T.

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June 24, 25; July 23.

JONES v. LONDON COUNTY COUNCIL.

[1934. J. 645.]

Superannuation—Poor Law Authorities—Employee of Boards of Guardians—Female Nurse—Guardians abolished—Transferred Officer of London County Council—Contributions to Superannuation Scheme—Poor Law Officers' Superannuation Fund—Contracting out while employee of Board of Guardians—Subsequent withdrawal of contracting-out notice by employee—Deductions—Rate of contributions—Rights of Employee after transfer to Council—London County (Transferred Poor Law Officers) Superannuation Scheme, 1930—*Poor Law Officers' Superannuation Act,* 1896 (59 & 60 *Vict. c.* 50)—*Poor Law Officers Superannuation Act Amendment Act,* 1897 (60 & 61 *Vict. c.* 28)—*Local Government Act,* 1929 (19 *Geo.* 5, *c.* 17), *s.* 119; *s.* 121, *sub-ss.* 1 *and* 2; *s.* 124, *sub-s.* 1.

The plaintiff entered the service of a board of guardians in 1904 as a probationer nurse and certain annual deductions were made from her salary for superannuation purposes. In 1907 she obtained employment as a charge nurse under the Metropolitan Asylums Board, and gave notice that, as a female nurse within the Poor Law Officers' Superannuation Act Amendment Act, 1897, she wished to contract out of superannuation benefits, i.e., did not wish to avail herself of the provisions of the Poor Law Officers' Superannuation Act, 1896. No deductions were therefore made from her salary by way of contribution to superannuation benefit, and the same procedure continued when after leaving the Asylums Board in 1908 she was employed from February, 1909, to 1923, as a superintendent nurse by another board of guardians. In that year she obtained employment under a different board of guardians as a charge nurse, but shortly after her appointment requested to be allowed to contribute to the poor law officers' superannuation fund. This request was granted by the board on her paying to them the deductions which would have been made from her salary for superannuation benefit while in the service of her two previous employers if she had not contracted out. This was duly paid by the plaintiff, and the necessary deductions made from her salary down to 1927, when she was appointed by the board to be an assistant matron at an orphanage, and therefore (having ceased to be a female nurse within the 1897 Act) could not contract out of the 1896 Act.

The proper deductions were therefore made by the board from her salary down to 1930, when by virtue of the Local Government Act, 1929, the duties and functions of the board of guardians were transferred to the defendant council whose servant the plaintiff consequently became. Down to 1933 the defendant council made deductions from the plaintiff's salary at the rate of 3½ per cent., but in 1933 they informed her that her rate of contribution under the superannuation scheme would be reduced to 2½ per cent. as from April 1, 1930, being the rate in respect of employees whose period of service did not on April 1, 1930, exceed ten years. They accordingly repaid her a sum which included (inter alia) the amount paid back by the plaintiff in 1923 while employed as a charge nurse, and the consequent deductions made from her salary down to 1927. These sums the plaintiff accepted under protest.

She accordingly commenced an action against the defendant council for a declaration (inter alia) that her contributions ought to be calculated at 3½ per cent. on the total amount of her salary on the footing that the period of her service to be considered in fixing the amount of these contributions to the superannuation scheme was on April 1, 1930, more than twenty years.

This the defendant council denied, on the ground that as the plaintiff had in 1907 contracted out of the 1896 Act, her service with poor law authorities down to 1927 when she became an assistant matron could not be aggregated for superannuation purposes; that the deductions made from her salary when she became a charge nurse in 1923 and down to 1927 were illegal; and that the board of guardians in accepting from the plaintiff the payment of the deductions from her salary above mentioned had acted ultra vires. They further contended that a contracting-out notice once given could never be withdrawn and that it applied to the whole of her future service as a female nurse:—

Held, that the board of guardians had not acted illegally in 1923 in permitting the withdrawal of the contracting-out notice and requiring the plaintiff as a condition of that withdrawal to repay the sums which would in the past years have been deducted from her salary if she had not contracted out of superannuation benefits; that the plaintiff was an officer by whom, on her transfer to the defendant council, the annual contributions required by the 1896 Act had been made; and that on April 1, 1930, the plaintiff's employment extended over the aggregate period covered by her combined periods of service and exceeded twenty years. The deductions to be made by the defendant council out of the plaintiff's salary should therefore be at the rate of 3½ per cent.

WITNESS ACTION.

The plaintiff's claim was in respect of superannuation allowances affecting her position as an employee of the defendant council.

The material facts are fully set out in the judgment of the learned judge.

R. F. Roxburgh K.C. and *E. Gilbert Woodward* for the plaintiff.

They cited *Salford Guardians* v. *Dewhurst.* (1) The case also of *Gissing* v. *Liverpool Corporation* (2) is relied on.

Cyril Radcliffe K.C. and *Harold B. Williams* for the defendants.

Roxburgh K.C. in reply.

Cur. adv. vult.

July 23. LUXMOORE J. The plaintiff is in the employment of the defendant council. Her employment dates from April 1, 1930. Immediately before that date she was employed by the Bermondsey Board of Guardians. She had previously been employed by other poor law authorities. This action has been brought to determine a number of questions relating to the provisions for superannuation which affect her position with the defendant council. It was stated at the trial that there are many other employees of the London County Council in the same or substantially the same position as the plaintiff, and that this is in the nature of a test action.

Most of the questions raised in the pleadings appear to me to be future questions. I do not think it would be right to deal with them except so far as the answer to them or any of them may be implied in the answer to what appears to be the only present question—namely, at what rate are the plaintiff's contributions to the superannuation scheme governing her case to be calculated as from April 1, 1930, and at the present time ?

The plaintiff contends that her contributions ought to be calculated at 3½ per cent. on the total amount of her salary or wages and emoluments for the time being, on the footing that the period of her service to be taken into account in fixing the amount of her contributions to the superannuation scheme was on April 1, 1930, more than twenty years. The defendant council contends that the proper rate for the calculation of the plaintiff's contributions is 2½ per cent., this being the rate fixed in respect of employees whose period of service for this particular purpose did not exceed ten years on April 1, 1930.

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(1) [1926] A. C. 619.

(2) [1935] Ch. 1.

The answer to the question depends on a consideration of a number of statutory enactments—namely, the Poor Law Officers' Superannuation Act, 1896, the Poor Law Officers Superannuation Act Amendment Act, 1897, and the Local Government Act, 1929, and a scheme amending the London County Council's superannuation and provident fund scheme in accordance with s. 124, sub-s. 2 (*b*), of the Local Government Act, 1929, approved by the Minister of Health on March 27, 1930, intituled " The London County (Transferred Poor Law Officers) Superannuation Scheme, 1930." I will refer to those enactments and this scheme respectively by the titles assigned to them in the definition clause of the scheme—namely, the 1896 Act, the 1929 Act, and the Superannuation Scheme. The enactment of 1897, I will also call the 1897 Act. There is no dispute of fact.

The material facts are as follows: On January 1, 1904, the plaintiff entered the service of the Southwark Board of Guardians as a probationer nurse. Her probation period ended on January 1, 1907. During the whole of this period of three years (which I will call " the first period of service "), the Southwark Board of Guardians, in accordance with the provisions of the 1896 Act, deducted from the plaintiff's salary or wages and emoluments an annual sum calculated at the rate of 2 per cent. thereon. On July 20, 1907, the plaintiff entered the employment of the Metropolitan Asylums Board as a charge nurse. A few days after entering this employment, the plaintiff, being a female nurse within the meaning of the definition of that phrase contained in the 1897 Act, gave notice in writing (as she was entitled to do under the provisions of that Act) to the managers of the Metropolitan Asylums Board of her intention not to avail herself of the provisions of the 1896 Act, and so contracted out of superannuation benefit. The plaintiff remained in the service of the Metropolitan Asylums Board until December 24, 1908, and during the whole of this period of about seventeen months (which I will call " the second period of service "), she received her salary or wages and emoluments without any deduction being made therefrom by way of contribution to superannuation benefit. On February 7, 1909, the plaintiff entered the service of the Holborn Board of Guardians as a superintendent-nurse. No further notice under the 1897 Act of her intention to contract out of the 1896 Act was given by her to her new employers. She remained in the service of the Holborn Board of Guardians until February 10, 1923, a period of just over fourteen years. During the whole of this period for service (which I will call "the third period of service"), no deduction was made by her employers by way of contribution to superannuation benefit, and she received the appropriate salary or wages and emoluments in full.

On February 10, 1923, the plaintiff entered the service of the Bermondsey Board of Guardians as a charge nurse. She received her first month's salary without deduction. On March 4, 1923, she wrote to the clerk to the Board, calling attention to this fact and stating that she would like to contribute towards the Poor Law Officers' Superannuation Fund. On March 6, 1923, the clerk wrote in answer to her letter, stating that if she desired the whole of her service with previous poor law authorities to count for superannuation purposes, it was necessary that she should pay to the treasurer of the guardians the amount which would have been deducted from her salary for superannuation benefit while she was in the service of the Metropolitan Asylums Board and the Holborn Board of Guardians, namely, during the second and third periods of service. As the result of the necessary inquiries it was ascertained that the amount which would have been deducted from her salary or wages and emoluments for superannuation purposes, if she had not contracted out during the second and third periods of service, was 35*l.* 12*s.* 3*d.* This sum was duly paid by the plaintiff to the Bermondsey Board of Guardians, and the appropriate deduction by way of contribution for superannuation purposes was made by the Board from the plaintiff's salary or wages and emoluments from February 10, 1923, until July 13, 1927, when her employment as a charge nurse ceased. I will refer to the period of about four and a half years from February 10, 1923, to July 13, 1927, as "the fourth period of service." On July 13, 1927, the plaintiff was appointed by the Bermondsey Board of Guardians to be assistant matron of the Shirley residential school. This school receives pupils of both sexes between the ages of eighteen months and sixteen years, and is in the nature of an orphanage. In her capacity as assistant matron, it is the plaintiff's duty to assist in the administration work of the school, and although the plaintiff has, during the absence of the nurse in charge of the school hospital, to perform certain duties usually discharged by the nurse, it is admitted that on her appointment as assistant matron she ceased to be a female nurse within the meaning of the 1897 Act; and consequently was no longer in a position to contract out of the 1896 Act, even if she wished to do so, for it was decided in *Salford Guardians* v. *Dewhurst* (1) that no person within the scope of the 1896 Act is at liberty to contract out of its provisions in the absence of a statutory right so to do. An example of such a right is that conferred on a female nurse by the 1897 Act.

The plaintiff remained in the service of the Bermondsey Board of Guardians as assistant matron until March 31, 1930, a period of over two and a half years. (I will refer to this period as "the fifth period of service.") During the whole of this period the proper deductions were made by the Board from the plaintiff's salary or wages and emoluments. On April 1, 1930, under the provisions of the 1929 Act, the Bermondsey Board of Guardians ceased to exist, and its duties and functions were transferred to the defendant council.

By virtue of s. 119, and s. 121, sub-ss. 1 and 2, of the 1929 Act, the plaintiff became the servant of the defendant council, and as such entitled to receive the same salary or wages and emoluments as she had been receiving from the board of guardians during the fifth period of service.

On June 16, 1930, the plaintiff filled up and signed a form submitted to her by the defendant council setting out the particulars of her service with regard to superannuation. The particulars included a statement that the plaintiff entered the poor law service on January 1, 1904. At the foot of the particulars there is a declaration by the plaintiff: (I.) that she was in the service of a poor law authority on November 12, 1928; and (2.) that she desired to contribute to the superannuation scheme. The form also contained a paragraph in these words: " I elect to remain subject to the Poor Law Officers' Superannuation Act, 1896 " (i.e., the 1896 Act). This was struck out by the plaintiff. From and after April 1, 1930, the defendant council made deductions from the plaintiff's salary or wages and emoluments under the superannuation scheme at the rate of 3½ per cent. on the footing that the plaintiff had on April 1, 1930, completed more than twenty years service which would have been treated as service for the purposes of the 1896 Act. The defendant council continued to make deductions on this footing down to the month of June, 1933.

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(1) [1926] A. C. 619.

On June 21, 1933, the defendant council informed the plaintiff that her rate of contribution under the superannuation scheme would be reduced from 3½ per cent. to 2½ per cent. as from April 1, 1930, and that contributions overpaid by her would be returned.

The defendant council claimed that as the plaintiff had contracted out of the 1896 Act at the beginning of the second period of service, it was unable to aggregate her service during that period and the third and fourth periods of service for superannuation purposes, and that the deductions made from her salary or wages and emoluments during the fourth period of service were illegal; and also that the Bermondsey Board of Guardians in making such deductions and in accepting from the plaintiff the sum of 35*l*. 12*s*. 3*d*. in 1923, in respect of the second and third periods of service, had acted ultra vires.

The defendant council on July 12, 1933, paid to the plaintiff the sum of 54*l*. 5*s*. 9*d*. This sum comprised: (*a*) the 35*l*. 12*s*. 3*d*. paid by the plaintiff to the Bermondsey Board of Guardians in 1923; (*b*) the total amounts deducted by the Board from the plaintiff's salary or wages and emoluments during the fourth period of service; and (*c*) the difference between the deductions made by the defendant council from April 1, 1930, at the rate of 3½ per cent. and the amount calculated at 2½ per cent. on the plaintiff's salary or wages and emoluments from that date down to the month of June, 1933. The plaintiff accepted this sum under protest. It is admitted that if her contention in this action is correct, this sum must be repaid by her to the defendant council.

The position is certainly peculiar, for the plaintiff had (apart from any question of legality) at the date when she entered the service of the defendant council, either paid or suffered by way of deduction from her salary or wages and emoluments sums which in the aggregate are equal to the total amount which would have been deducted during the whole of the five periods of service if she had never contracted out of the 1896 Act. Moreover the Bermondsey Board of Guardians benefited by any irregularity, if such existed, for, if the deductions had been made during the second and third periods of service, the Metropolitan Asylums Board and the Holborn Board of Guardians would have benefited thereby, and the deductions would have become part of their respective common funds, while the Bermondsey Board of Guardians would have been liable, in the event of the plaintiff being entitled to a superannuation allowance, to pay to her the appropriate allowance on the basis that her service extended over at least the whole of the five periods of service, although no part of the deductions made during the second and third periods would have been received by the Bermondsey Board. By reason of the arrangement made the Bermondsey Board received a sum in respect of the second and third periods of service which would never have reached it, and were, to the extent of the sum received, in a better position than if the deductions had been legally made at the proper and appropriate dates.

The defendant council is in no worse position financially by reason of what has happened, for it makes no difference to it whether the deductions had been made by the Metropolitan Asylums Board and the Holborn Board of Guardians respectively (and in due course incorporated in their respective common funds), or the equivalent amount had been paid to the Bermondsey Board and incorporated in its common fund.

The defendant council, however, contends that the arrangement made by the plaintiff and the Bermondsey Board was illegal, and that that Board had no power to agree with the plaintiff: (1.) that the contracting-out notice given by her at the beginning of the second period of service should be cancelled and (2.), that she should, on payment of the 35*l*. 12*s*. 3*d*. in respect of the second and third periods of service, be placed in the same position with regard to superannuation as if that notice had never been given. The defendant council further contends that a contracting-out notice once given can never be withdrawn, and that the plaintiff's contracting-out notice applied to the whole of the plaintiff's future service as a female nurse, whether she remained in the same employment or subsequently changed it, with the result that the Bermondsey Board had no power, even with the consent of the plaintiff, to make any deductions for superannuation purposes during the fourth period of service. The defendant council admit that the deductions made during the fifth period of service were validly made, because the plaintiff on entering upon the new duties undertaken in that period ceased to be within the provisions of the 1897 Act, and was no longer legally entitled to contract out of the 1896 Act.

It is therefore necessary to examine the contentions put forward by the defendant council with regard to the second, third and fourth periods of service. It is settled that the 1896 Act does not permit contracting out (see *Salford Guardians* v. *Dewhurst*). (1) This is a legal fetter on the ordinary contractual capacity possessed by individuals and other legal entities. The 1897 Act removed this fetter in the case of a class of individuals falling within the definition of "Female Nurse" contained in the 1897 Act, and enabled a member of that class to elect to remain outside the 1896 Act. There is certainly no express provision in the 1897 Act prohibiting a person, who has contracted out of the 1896 Act and the poor law authority employing her, from agreeing in exercise of their respective contractual capacities that the election to contract out shall be cancelled upon terms mutually agreeable.

(1) [1926] A. C. 619.

I am unable to read into the 1897 Act by necessary implication any prohibition against such an agreement. If the defendant council's contention is sound, a female nurse who has once elected to contract out could not be allowed to withdraw her election with the consent of the authority employing her, although she was desirous of so doing on the next day after she had signed her notice, but is bound by it for all the time she follows the vocation of a female nurse, even if she enters into the employment of a new poor law authority. I am unable to appreciate any reasonable ground on which the Legislature should prohibit such an agreement, and, consequently, in the absence of express prohibition, there would appear to be no proper ground on which to infer such a prohibition by implication.

It follows that in my judgment the contract entered into by the plaintiff with the Bermondsey Board of Guardians, when she entered upon the fourth period of service, was unobjectionable in law. I can see nothing ultra vires in the act of the Bermondsey Board of Guardians in requiring the plaintiff to pay to it the sum of 35*l.* 12*s.* 3*d.* as a condition upon which the withdrawal of the contracting-out notice would be permitted. The agreement that deductions for superannuation under the 1896 Act should be made during the fourth period of service stands, if possible, on an even surer basis.

In my judgment the plaintiff was, to use the phraseology of s. 124, sub-s. 1, of the 1929 Act, an officer, by whom the annual contributions required by the 1896 Act had been made at the date when she was transferred to the service of the defendant council; and those contributions, in the events which have happened, extended over the whole of the five periods of her service to which I have referred, with the result that on April 1, 1930, the plaintiff's service, which (to use the words of the superannuation scheme, cl. 2, sub-cl. 4), could have been treated as service for the purposes of the 1896 Act, extended over the aggregate period covered by the five periods of service. This exceeds twenty years, and consequently the deductions, which fall to be made from the plaintiff's salary or wages and emoluments under the superannuation scheme, are to be calculated at the rate of 3½ per cent. of such salary or wages and emoluments.

During the argument my attention was called to the decision of the Court of Appeal in *Gissing* v. *Liverpool Corporation*. (1) Since the hearing of the present case, the decision of Farwell J. in *In re Tees Conservancy Act*, 1907. *Tees Conservancy Commissioners* v. *James* has been published in the Law Reports. (2) Neither of these decisions appears to me to deal with the precise question with which I have dealt in the present case, or to affect the conclusion at which I have arrived. I appreciate, however, that if, contrary to the view expressed by me, the agreement between the plaintiff and the Bermondsey Board of Guardians was illegal and is therefore void, a number of questions may hereafter arise, as the result of those decisions, with regard to the amount of the plaintiff's superannuation allowance. Some of these questions were adumbrated during the argument before me, but I have purposely refrained from dealing with any of them.

In the result, I will make a declaration that, on the true construction of the superannuation scheme and in the events which have happened, the plaintiff had, on April 1, 1930, completed over twenty years' service which would have been treated as service for the purposes of the 1896 Act, and that she was as from that date, and still is, liable to have deducted by the defendant council from her salary or wages and emoluments, contributions calculated at the rate of 3½ per cent. of such salary or wages and emoluments.

The plaintiff must repay to the defendant council the sum of 54*l*. 5*s*. 9*d*. paid to her on July 3, 1933.

The defendant council must pay the plaintiff's costs of this action.

Solicitors: *Stutfield and Son; J. R. H. Roberts, Solicitor to the London County Council.*

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(1) [1935] Ch. 1.

(2) [1935] Ch. 544.

A. R. T.

In re H. W. BAKER.

FARWELL J.

1935
July 15.

Bankruptcy—Voluntary Settlement—Power given to Settlor to raise at any time 150*l. for any purpose—Settlor's Debts not exceeding* 100*l. at date of Settlement—Settlor adjudicated Bankrupt more than two years after date of Settlement—Power to Settlor to revoke whole of trusts in Settlement with consent of Trustees or Judge of the Chancery Division—Settlement not void against Trustee in Bankruptcy—Bankruptcy Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 42, *sub-s.* 1 *—Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 172, *sub-s.* 1.

On March 19, 1932, the settlor executed a voluntary deed of settlement by which he assigned all his interests under two wills to trustees upon certain trusts. By clause 5 he gave himself power at any time to raise the sum of 150*l.* without the consent of the trustees. At the date of the settlement his debts did not exceed 100*l.* On February 22, 1935, he was adjudicated bankrupt:—

Held, that the deed was not void under s. 42, sub-s. 1, of the Bankruptcy Act, 1914, against the trustee in bankruptcy.

Clause 7 of the deed gave the settlor power to revoke the whole of the trusts in the settlement with the consent either of the trustees or of a judge of the Chancery Division.

Held, that the deed was not void under s. 172, sub-s. 1, of the Law of Property Act, 1925, against the trustee in bankruptcy.

BANKRUPTCY MOTION.

The bankrupt had no means of his own, but he had fairly substantial reversionary interests under two wills. He went up to Cambridge University, and for the purpose of financing his position there, moneys were borrowed after he came of age in 1928 on the security of these interests, and quite substantial sums were raised and paid to him or for his benefit during the time he was at Cambridge. His debts, when he left Cambridge, amounted to about 30*l.* After he left Cambridge he obtained a position as salesman with a firm of motor-car agents at a salary of 3*l.* a week. He also incurred a debt to a moneylender for under 50*l.*, and the moneylender had issued a writ early in March, 1932, to recover the amount due. Those were the only debts he owed on March 19, 1932.

On March 19, 1932, the bankrupt executed a deed, whereby he appointed the respondents trustees of the deed, and he assigned to them all his reversionary interests, subject to certain provisions, and the mortgages raised after he attained the age of twenty-one years. He also assigned: "All other, if any, the shares or interests to which the settlor is or may be or become in any manner entitled of and in the said estates or the investments and property representing the same or any part thereof to have and receive the same subject to the mortgages aforesaid unto the trustees absolutely upon the trusts hereinafter declared concerning the same." The deed further provided that: "The trustees shall stand possessed of the shares, interests and premises hereinbefore assigned and the investments for the time being representing the same (hereinafter called 'the trust fund') and of the annual income thereof upon the trusts and subject to the powers and provisions following (that is to say): (1.) Upon trust during the lifetime of the settlor to apply the annual income of the trust fund for the maintenance support or otherwise for the benefit of all or any one or more exclusively of the other or others of the settlor and any wife and issue of his for the time being in existence and any persons who if he had died intestate would for the time being be entitled to the trust fund or the income thereof as the trustees in their absolute discretion without being liable to account for the exercise of such discretion think fit." Clause 5 provided that: "Notwithstanding any of the trusts hereinbefore contained the following provisions shall have effect: 1. The settlor shall have power without any consent at any time to raise for his own benefit by mortgage (at interest at any rate to which he may agree) of the trust fund or any part thereof any sum or sums not exceeding 150*l.* and the trustees shall if required concur in any such mortgage to charge the trust fund with the repayment of the principal moneys and interest and other moneys secured thereon." Clause 2 (*c*) was as follows:—"With the consent of the settlor any sum or sums up to the whole value of the trust fund and after payment thereout of all mortgages (if any) then affecting the trust fund or with the consent of the owners of such mortgage securities to pay or apply the said sum or sums in any manner to or for the benefit of all or any of them the settlor and his wife, children and remoter issue for the time being in existence and a decision of the trustees that an application of such sum or sums is for the benefit of all or some or one of such persons shall be binding on all persons interested in the trust fund." Clause 7 provided that: "It shall be lawful for the settlor at any time, with the approval of the trustees or of a judge of the Chancery Division of the High Court of Justice, subject and without prejudice to any mortgages or charges which shall have been created under any of the powers hereinbefore contained by deed, to revoke or vary wholly or partially the trusts hereby declared and the powers and provisions herein contained and at his option and with such approval as aforesaid to substitute therefor new trusts, powers and provisions for the benefit of the settlor, his wife and issue if any or any of them or any other persons or purposes whatsoever."

At the date of the execution of the deed the bankrupt was unmarried and was in the employment of the motor-car firm, but subsequently he married and went into a business of his own which failed. He again had resort to moneylenders, and he procured loans from them which he did not discharge. On February 18, 1935, a receiving order was made against him on a petition of the moneylenders. On February 22 he was adjudicated bankrupt, and the applicant was appointed trustee in bankruptcy.

This application was made by the trustee in bankruptcy, and it asked for a declaration that the deed of March 19, 1932, was fraudulent and void against the trustee under s. 172 of the Law of Property Act, 1925, and was also void against the trustee under s. 42 of the Bankruptcy Act, 1914, as a voluntary conveyance made within ten years of the bankruptcy.

A. Grant K.C. and *R. F. Levy* for the applicant.
A. H. Droop for the respondents.

FARWELL J. The question I have to determine is whether or not the settlement is void under either s. 42 of the

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Bankruptcy Act, 1914, or s. 172 of the Law of Property Act, 1925. Sect. 42, sub-s. 1, of the Bankruptcy Act provides as follows: "Any settlement of property, not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy." That event has not happened; the settlement was made in March, 1932, and the bankrupt did not become bankrupt until 1935, so the first part of the section does not apply at all. The second part of the sub-section is the material part: "and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property passed to the trustee of such settlement on the execution thereof." It is said in this case that at the date of the settlement the bankrupt was not in a position to pay his debts without the property which was settled, and that since these reversionary interests passed to the trustee of the settlement, it is necessarily void under that section. It has to be borne in mind that when this section speaks of a person being "able to pay all his debts without the aid of the property comprised in the settlement," these words must be read with this limitation upon them. They must be read as meaning: "without the aid of the property which by the settlement passes to other persons." That is the result of the decision in *In re Lowndes* (1), which, it seems to me, I ought to follow, and accordingly I have to consider whether this bankrupt was in a position at the date of the settlement to pay his debts without the property

(1) (1887) 18 Q. B. D. 677.

which by virtue of the settlement passed to other persons. Further it is said on behalf of the trustee in bankruptcy that the onus of proving that the settlor was at the time of making the settlement able to pay his debts without the aid of the settled property, is upon the persons who claim under the settlement, and that that onus has not been discharged, since there is no evidence, upon which I can properly act, that the whole of the debts owing by the bankrupt at the date of the settlement did not exceed 150*l.* It is pointed out that the one person who would know certainly as to this is the bankrupt himself, and that he has given no evidence; the only evidence as to this before the Court being an affidavit by one of the trustees who was the solicitor who acted in the matter. The contention that the onus of proof is on those supporting the settlement is no doubt well founded, but having regard to the evidence in this case, including the evidence given by the bankrupt at his examination, there is in my judgment sufficient to justify me in holding that the persons claiming under the settlement have proved that the debts due at the date of the settlement did not exceed 150*l.* If that be so, was the bankrupt at the date of the settlement in a position to pay his debts without the property which passed to other people under the settlement? In that connection it must be remembered that the settlement expressly provides that the settlor shall have the power at any time, without anybody's consent at all, to raise the sum of 150*l.* out of the settled funds. That sum was more than sufficient to pay in full the debts which the settlor had at the date of the settlement, and in my judgment the true result of that is that the position is exactly the same as if the settlor had retained in his own hands a sum of 150*l.* with a view to settling these debts if he thought fit to do so. If he had retained 150*l.* in his own hands, it would be impossible for the trustee in bankruptcy to say he had not at the date of the settlement enough to discharge his debts, which amounted to less than that sum. He was in a position at any time to raise 150*l.*, and that money, which was his own money, could have been used by him if he had thought fit to pay his creditors. For these reasons, in my judgment, this settlement does not come within s. 42 of the Bankruptcy Act, 1914, and is not void against the trustee in bankruptcy on the ground that the settlor was not in a position to pay his debts without the aid of the property at the time the settlement was made.

That being so, it remains for me to consider shortly whether, the settlement not being void under s. 42 of the Bankruptcy Act, it is void or voidable under s. 172, sub-s. 1, of the Law of Property Act, 1925. That sub-section provides as follows: "Save as provided in this section, every conveyance of property, made whether before or after the commencement of this Act, with intent to defraud creditors, shall be voidable, at the instance of any person thereby prejudiced." The authorities establish that the question whether a particular settlement is voidable or not under that sub-section is a matter which must be determined on the facts of the particular case. It may be that this settlement would have come within s. 172 had there been no such provision as is found in clause 7. The settlor is settling the whole of his property upon certain trusts. Those trusts, apart from clause 7 and except to the extent of 150*l.*, take the property away from the bankrupt or his trustee in bankruptcy and put it in the hands of his trustees, who can deal with it in various ways adversely to him, and it may well be that apart from clause 7 the settlement is one which might have resulted in defeating or defrauding creditors, and therefore might be voidable. But in this particular case I cannot overlook the provision in clause 7 of the settlement. That clause gives the settlor absolute power to revoke the whole of the trusts in this settlement with the consent either of the trustees or of a judge of the Chancery Division. That is a general power which, in my judgment, is exercisable by a trustee in bankruptcy. The trustee in bankruptcy, if he cannot obtain the consent of the trustees to a revocation of the settlement, either wholly or in part, is entitled to apply to a judge of the Chancery Division for his sanction, and in a proper case he would no doubt obtain the sanction of the judge either to a complete revocation or to a revocation to the extent necessary to enable the debts to be paid. If the only revocation necessary was a revocation of a portion of the trusts for the purpose of enabling the debts to be paid, leaving the rest of the property in settlement, such an arrangement might well be very greatly to the benefit of the settlor. However that may be, this is a power which, in my judgment, the trustee in bankruptcy can himself exercise, of revoking the settlement with the consent either of the trustees or a judge of the Chancery Division. In the face of that it appears to me to be impossible to hold that this was a settlement executed with an intent to defraud creditors. One cannot conceive that a judge in the Chancery Division in a proper case would refuse the sanction of the Court to the revocation of the settlement to the extent necessary for paying debts. I am not saying that there might not be circumstances under which the Court might think it right to refuse its sanction, but that the Court would refuse its sanction in a case which, if the sanction was refused, would result in a fraud on the creditors, I cannot believe. In my judgment this power, inserted in the settlement in this form, shows that so far from intending to defraud the creditors, the whole object of this settlement was to protect the bankrupt against himself, without preventing a trustee in bankruptcy getting the benefit of whatever property there was available for the payment of the debts in a proper case.

Having regard to those circumstances, it appears to me quite impossible to come to the conclusion that the settlement was void under s. 172 of the Law of Property Act. It was suggested that, although I am to-day sitting in Bankruptcy, as I am a judge of the Chancery Division, I might here and now sanction a revocation. It does not appear to me that that would be a proper course for me to adopt. I am sitting to-day in Bankruptcy, and I am dealing with this matter as a judge of the Bankruptcy Court. If it is thought right to make an application to a Chancery judge for his sanction, nothing which I decide to-day can affect that application in any way.

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The result is that the applicant takes nothing by the motion, and it must be dismissed with costs.

Solicitors for the applicant: *Philip Goodenday & Co.*
Solicitors for the respondents: *Hicks, Arnold & Bender.*

P. J. B.

FARWELL J.

1935

July 15.

In re RISSIK.

Deed of Arrangement—Death of Debtor—All debts fully discharged by Trustee of Deed—Surplus in hands of Trustee—Creditors not entitled to Interest on their Debts without provision express or implied, in Deed—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59) *s.* 33, *sub-s.* 8; *s.* 69.

A debtor executed a deed of arrangement, and after his death the trustee of the deed, having discharged all the debts, had a considerable surplus in his hands:—

Held, that there being no provision, express or implied, in the deed for the payment of interest on the debts, the creditors were not entitled to interest and that the surplus, after payment of the trustee's costs and expenses, belonged to the legal personal representatives of the deceased debtor.

BANKRUPTCY MOTION.

This motion raised the question whether, when the trustee under a deed of arrangement has a surplus in his hands after payment of all the debts of a deceased debtor, the creditors are entitled to interest on their debts before any surplus is paid to the legal personal representatives of the debtor. The facts are fully set forth in the judgment.

Oscar Kean for the trustee of the deed.

Gavin Simonds K.C. and *P. J. Sykes* for the legal personal representatives of the debtor.

C. Duveen for the creditors.

FARWELL J. This is a motion by the trustee under a deed of arrangement, dated July 18, 1910, for the directions of the Court whether he is entitled to pay to the creditors interest on their debts, and if so at what rate, out of the money in his hands before paying the surplus to the legal personal representatives of the debtor.

The motion in the first instance came before Mr. Registrar Mellor, but with the consent of all parties has been adjourned to me. The debtor by the deed in question assigned to the trustee the whole or practically the whole of his property upon the trusts therein contained. He died on January 4, 1928. All the debts have been paid in full and there is or will be a substantial surplus in the hands of the trustee. The representatives of the debtor claim that subject to the payment of any costs, charges and expenses of the trustee still unpaid they are entitled to such surplus, while the creditors claim that they are entitled to interest on their debts before there is any surplus for the debtor's representatives. Which of those contentions should prevail depends, in my judgment, wholly upon the true construction of the deed. Unless there is either express or implied some provision in the deed for payment of interest, no interest is payable.

By the deed the property is assigned to the trustee "upon trust to pay all rates, taxes, wages and similar claims, if any, which would be payable in full or in priority in bankruptcy, and subject as aforesaid upon trust thereout to pay and discharge rateably according to the laws of bankruptcy and in such preference or priority and by such dividends as the trustee shall think fit the debts due to the creditors, and to pay the surplus if any to the debtor his executors administrators and assigns."

It is said on behalf of the creditors that under that provision interest is payable by virtue of s. 33, sub-s. 8, of the Bankruptcy Act, 1914. That sub-section provides that: "If there is any surplus after payment of the foregoing debts, it shall be applied in payment of interest from the date of the receiving order at the rate of four pounds per centum per annum on all debts proved in the bankruptcy." Sect. 69 provides for the payment of any surplus to the bankrupt.

It is said that some meaning must be given to the words in the deed "according to the laws of bankruptcy" and that unless these words have the effect of importing that sub-section into the deed, they are mere surplusage. I cannot accept that contention. In my judgment, as a matter of construction, it is reasonably plain that these words relate and relate only to the preceding word "rateably" and do not import any provision as to payment of interest. In my view the words referred to were inserted in the deed to emphasize the direction that the payment of debts were to be made rateably, and are not apt to provide for payment of interest or to import into the deed any provisions other than those necessary to ensure a rateable distribution. If it had been intended to provide for payment of interest it would have been easy to so provide in express terms, and in the absence of any such provision there is no justification for reading into the deed an agreement by the debtor to pay interest on the debts. In my judgment, therefore, after payment in full of the debts and costs, the debtor's legal personal representatives are entitled to the balance of the moneys in the hands of the trustee, and I will declare accordingly.

The costs of all parties of this motion must be taxed as between solicitor and client and retained and paid by the trustee out of the moneys in his hands.

Solicitors: *Wild, Collins & Crosse*; *Elkin, Henriques & Harford.*

P. J. B.

In re BOWDEN.

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J.

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July 19.

[1935. B. 126.]

Voluntary settlement—Expectancy—Receipt of property by trustees—Settlor requests trustees to transfer property to her as her absolute property—Property impressed with trusts of settlement.

By a voluntary settlement made in 1868 a settlor settled any property to which she might become entitled upon the death of her father and gave to the trustees of the settlement full power to receive and give receipts for the same or any part thereof in her name. Her father died in 1869 and during the years 1871–1874 his executors transferred the share of the settlor under her father's will to the trustees of the voluntary settlement. In 1935 the settlor requested the trustees to transfer the funds representing the above mentioned property to her as her absolute property:—

Held, that the original trustees had received the settlor's share under a valid authority unrevoked, and that it became impressed with the trusts contained in the settlement.

Meek v. *Kettlewell* (1842) 1 Ha. 464 and *In re Ellenborough* [1903] 1 Ch. 697 distinguished.

ADJOURNED SUMMONS.

By a voluntary settlement dated July 9, 1868, the settlor, Catherine Henrietta Bowden, purported to assign to the trustees of the settlement (inter alia) all the share and interest of the settlor to which upon the decease of her father in her lifetime she might become entitled under his will or any codicil thereto, with full power to the trustees and the survivor of them and the representatives and assigns of such survivor to receive and give receipts for the same or any part thereof in the name of the settlor to have, receive and take the premises thereinbefore assigned and to hold the same when received upon the trusts set out in the settlement, which included charitable trusts.

Shortly after the execution of the settlement and before the date of the death of her father the settlor became a professed nun in a community of Roman Catholic nuns established at Stone in the county of Stafford and known as St. Dominic's Convent, and ever since that date she remained a member of that community.

The settlor's father died on November 18, 1869, and during the years 1871–1874 the executors of his will transferred to the trustees of the settlement various sums together constituting the share to which the settlor became entitled under her father's will.

In 1935 the settlor requested the trustees of the settlement to transfer to her as her absolute property the investments and cash representing the funds held by them as trustees of the settlement, on the ground that the only property effectively settled by the settlement was certain other property not material to this report and that the funds representing that property were already exhausted. The settlor, in making this request, stated that she never authorized or directed the executors of her father's will to make any transfer or payment of any investments or cash representing her share thereunder to the trustees of the settlement, and that she was not consulted on the occasion of any such transfer or payment or aware that any such transfer or payment was proposed to be made or had been made.

This summons was taken out by the trustees of the settlement for the determination of the question (inter alia) whether the plaintiffs ought to transfer to the settlor as her absolute property the investments and cash held by them representing the funds comprised in the settlement.

A. G. N. Cross (*H. F. F. Greenland* with him) for the plaintiffs.

R. W. Goff for the settlor. The funds are the absolute property of the settlor. The settlement being a voluntary settlement of something which was not hers is void. So far as it purported to be an assignment it was unenforceable. The trustees received the money for the settlor as her agent. The settlement being, therefore, something which they cannot set up, the settlor is entitled to the property. The assignment, if voluntary, is wholly inoperative—inoperative as an assignment and inoperative for want of consideration. A voluntary settlement of an expectancy is void; alternatively it is unenforceable: see *Meek* v. *Kettlewell.* (1)

The trustees can only rely on the direction in the settlement that they are to have power to demand the money and give a receipt for it. It is true that they have the money, but the settlor did not give it to them. They received it for her and it is their duty to hand it over to her. He referred also to *In re Ellenborough.* (2)

J. H. Stamp for the Attorney-General. The power to receive and give receipts in this case is fatal to the argument on behalf of the settlor. No one has ever suggested that a power of attorney could not be given in respect of future assets. All that the authorities show is that a person interested cannot go to a court of equity to effect the completion of a voluntary settlement of a spes successionis when it matures. If it is unnecessary to go to a court of equity for help those authorities do not help the settlor.

Here the settlor gave express power to the trustees to receive future property. That power will operate until revoked. The mere fact that the debt was not in existence at the date of the giving of the power makes no difference to the right of the attorney to receive the assets when they come into existence. The attorney here is under no duty to tell the settlor when the money came into existence. The trustees are to hold it on the trusts of the settlement. If she had wished to do so the settlor could have revoked the power before it was acted on. The question is whether the property has ever become so held as to be subject to the trust. The moment the property does so it is bound by the deed.

P. M. Walters and *R. C. H. Horne* (*Roger Turnbull* with them) for other parties interested.

BENNETT J. This is a summons in the matter of a settlement dated July 9, 1868, made by the defendant Miss Catherine Henrietta Bowden, and the plaintiffs ask the Court whether they, being the trustees of this settlement, ought to transfer to the settlor as her absolute property investments and cash

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(1) 1 Ha. 464, 469.

(2) [1903] 1 Ch. 697.

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now held by them representing the funds subject to the settlement.

The settlement was made at the time when the settlor was proposing to become a member of a religious order or community of nuns of the Roman Catholic Church established at Stone in the county of Stafford.

By the settlement she assigned to the trustees the interest in remainder vested in her under her parents' marriage settlement and also an expectation or expectations which so far as material are described in the settlement as all the share and interest "to which upon the decease of the said Henry Bowden [the settlor's father] in her lifetime she may become entitled under and by virtue of his will or any codicil thereto or as one of his next of kin or otherwise from or under the said Henry Bowden."

As regards the second subject which the settlor purported to assign she had only a spes successionis and no property capable of assignment by law: but in addition to purporting to assign her expectation under her father's will or intestacy she appointed the trustees of the settlement her agents to receive her share of whatever might come to her under her father's will. She appointed them her attorneys to receive any property which might become hers. To such an appointment no objection can be taken or is taken. It is plain, I think, that it operated to appoint the two trustees the settlor's agents, to receive anything to which she might become entitled under her father's will or under his intestacy. Then the settlement proceeds to declare the trusts of anything which the agents might receive from the settlor's father as her agents and to provide that it is to be held on trusts not material for the decision of the present question.

The settlor's father died on November 18, 1869, the settlor not having revoked the power of attorney or authority given to the trustees of the settlement to receive the interest to which she might become entitled under her father's will or on his intestacy; and in due course of time these trustees as the settlor's agents received from the executors of the will substantial sums, and from the time when they were received those sums have been held by the original and subsequent trustees on the trusts of the voluntary settlement.

In the year 1935 it seems to have occurred to the settlor that she might not have settled what came to her, so on January 23, 1935, she addressed a communication in writing to the trustees requesting them to transfer to her as her absolute property the cash representing the fund. She states that to the best of her knowledge she never authorized the transfer of any such property to the trustees of that settlement. Those are the facts which give rise to the question raised by the summons.

Counsel for the settlor submitted that the question should be answered in the affirmative and that the property the subject of the trusts of the settlement should be transferred to her. He based his argument on the authority of *Meek* v. *Kettlewell* (1) and *In re Ellenborough* (2) and contended that the settlement, being a voluntary settlement, was void and altogether unenforceable. Neither of these authorities supports either of his propositions. All that was decided in *Meek* v. *Kettlewell* (1) was that where the assistance of the court of equity is needed to enable the trustees of a voluntary settlement to obtain possession of property subjected to the trusts of the voluntary settlement, the property not having been vested in the trustees, a court of equity will render no assistance to the plaintiff.

But here nobody is seeking the assistance of the court of equity to enforce the voluntary settlement. Under a valid authority, unrevoked, the persons appointed trustees under the settlement received the settlor's interest under her father's will, and, immediately after it had been received by them, as a result of her own act and her own declaration, contained in the voluntary settlement, it became impressed with the trusts contained in the settlement.

No assistance is required from a court of equity to put the property into the hands of the trustees.

I can find no ground which enables me to decide that the trustees of this settlement must, after sixty years, hand over

(1) 1 Ha. 464. (2) [1903] 1 Ch. 697.

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the property to the settlor. I therefore answer the question in the negative.

Solicitors: *Metcalfe, Hussey & Hulbert; Treasury Solicitor.*

J. L. D.

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HEARTS OF OAK ASSURANCE COMPANY, LIMITED v. JAMES FLOWER & SONS (A FIRM).

[1933. H. 2210.]

Company—Evidence—Minutes to be entered in books—Loose leaves fastened together in two covers—Admissibility as evidence—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 120.

Entries made in a number of loose leaves fastened together in two covers are not admissible in evidence as minutes entered in books within the meaning of s. 120 of the Companies Act, 1929.

IN this action (the facts of which are immaterial for the purposes of this report) the question arose whether some minutes of directors' meetings of a company, consisting of a number of loose leaves fastened together in two covers, which were tendered as evidence, were admissible in evidence as minutes entered in books within the meaning of s. 120 of the Companies Act, 1920. (1)

Fergus Morton K.C., Sir George Jones and *Wilcock-Holgate* for the plaintiffs.

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(1) By s. 120 of the Companies Act, 1929, it is provided: " (1.) Every company shall cause minutes of all proceedings of general meetings, and where there are directors or managers, of all proceedings at meetings of its directors or of its managers, to be entered in books kept for that purpose.

(2.) Any such minute if purporting to be signed by the chairman of the meeting at which the proceedings were had, or by the chairman of the next succeeding meeting, shall be evidence of the proceedings.

(3.) Where minutes have been made in accordance with the provisions of this section of the proceedings at any general meeting of the company or meeting of directors or managers, then, until the contrary is proved, the meeting shall be deemed to have been duly held and convened, and all proceedings had thereat to have been duly had, and all appointments of directors, managers, or liquidators, shall be deemed to be valid," *Gavin Simonds* K.C., *B. B. Stenham* and *A. S. Wells* for the defendants.

BENNETT J. Mr. Morton in this case seeks to put in evidence against the defendants some minutes of directors' meetings, held on September 1 and 2, which are recorded in what he submits is the minute book of the plaintiff company. He proposes to put the book in without calling any witness to depose to its accuracy or to the fact of the minutes of the 1st and 2nd September being a true record of what passed at the directors' meetings held on those two dates. There will therefore be no witness whom the defendants can cross-examine as to the accuracy of the record. Mr. Morton is entitled to take this course if the thing produced is a book within the meaning of s. 120 of the Companies Act, 1929, and if the minutes which he desires to use purport to be signed by the chairman of the meeting at which the proceedings were had or by the chairman of the next succeeding meeting. That which he calls the minute book of the plaintiff company consists of a number of loose leaves fastened together in two covers in such a physical condition that, at any moment, if any one wishes to do so he can take any number of leaves out and substitute any number of other leaves. It is a thing with which any one disposed to be dishonest can easily tamper, and the question is whether such a thing is a book within the meaning of s. 120 of the Companies Act, 1929. There appears to be no authority on that point.

I propose to hold that it is not, because I consider that it is most undesirable that something from which a part may be taken out or into which something else may be put should be used in evidence without the sanction of an oath as to its accuracy and without the party against whom the evidence is to be used being able to test its accuracy by cross examination; and on the ground that what is tendered in evidence is not a book within the meaning of s. 120 of the Companies Act, 1929, I reject the evidence.

Solicitors: *Kingsley Wood, Williams & Murphy*; *Russell & Arnholz.*

J. L. D.

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LUXMOORE J.

March 26, 27, 28; *April* 10, 11, 12, 13, 17, 18, 24; *Nov.* 30.

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May 31; *June* 4, 5, 6; *July* 17.

CORPORATION OF LONDON *v.* LYONS SON AND COMPANY (FRUIT BROKERS), LIMITED.

[1931. L. 2488.]

Market—Disturbance—Carrying on Rival Market—Sales by auction—Refusal of accommodation in the market—Refusal for reasons other than lack of space—Right to use market for sales by auction—No right of action for disturbance.

A trader has the same right on paying the proper tolls to sell by auction in a market the marketable goods of others as he has to use the market for selling his own goods by private treaty and there is the same obligation on the market owner to provide him with accommodation.

Nicholls v. *Tavistock Urban District Council* [1923] 2 Ch. 18 approved.

Where therefore the owners of a market refused for reasons other than lack of room to allow a trader to use the market for sales by auction of the marketable goods of others, they could not maintain an action to restrain the trader from carrying on auctions in premises close to but outside the market, in a manner which did not amount to the setting up of a rival market, on the ground that he was causing a disturbance of the market.

So *held* by the Court of Appeal (Lord Hanworth M.R., Romer and Maugham L.JJ.), affirming the decision of Luxmoore J.

ACTION.

The Corporation of the City of London are owners of Spitalfields Market. For some years, before and after the Corporation took over the conduct of the market, auction sales were held within the market.

In the year 1929 a building within the market was leased to the London Fruit Exchange Association, Ld., which was formed on July 30, 1929, and after that date the Corporation declined to allow any facilities for sale by auction to any person not interested in the London Fruit Exchange Association, Ld.

The defendant company held a number of auction sales at offices rented by it at Nos. 36 and 37, Steward Street, which it claimed to be within the market.

The Corporation claimed a declaration that Nos. 36 and 37, Steward Street were not within Spitalfields Market and an injunction to restrain the defendants from holding auctions at Nos. 36 and 37, Steward Street of goods similar to those sold in the market. The defendants counterclaimed for (1.) a declaration that they were entitled to sell by auction within the market fruit, vegetables and other like commodities upon payment of the reasonable and customary tolls, and (2.) a declaration that 36 and 37, Steward Street formed part of the market.

The facts are fully set out in the judgment of Luxmoore J.

Wilfrid Greene K.C., *Gavin Simonds K.C.*, and *Wilfrid Hunt* for the plaintiffs. The defendants are not entitled to sell by auction within the market. The history of the market begins with a charter to the City of London in the first year of Edward III., 1326–7. This lays down (among other matters) that no market shall be granted by the Crown to any one within seven miles in circuit of the City of London. Those words are equivalent to a private Act of Parliament and can only be overridden by an Act of Parliament; that is it is necessary to have an Act of Parliament before a new market can be set up within the radius indicated in the charter, apart from the common law affecting grants of market.

With the consent of the Corporation of London a new market could of course be set up, but not without their permission; even the Crown could not by charter grant permission to set up a rival market without the Corporation's consent. This charter of Edward III. has been confirmed by the Crown on many subsequent occasions. The common law position of the City regarding the establishment of a market at Islington was before the judges in *In re the Islington Market Bill.* (1) There the effect of a second charter following the grant of a previous charter was discussed and an opinion given by the judges; and the whole question of the grant of a new market gone into. The Bill subsequently passed was the Act 5 & 6 Will. 4, c. cxi., and see specially s. 46, which gives compensation to the City of London on the

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(1) (1835) 3 Cl. & F. 513.

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grant of a market at Islington for any loss or injury sustained by them by diminution of the tolls and profits of Smithfield Market due to the establishment of the new market.

As regards Spitalfields Market, this was established by letters patent of 34 Charles II. dated July 29, 1682. In these letters patent—which are in Latin—the words translated as "in or near," were "in sive juxta." These words give a power to the franchise owner—not a third party of his own motion—to extend his market to adjacent land. In modern times the question of the rights, etc., affecting the market came up in the case of *Goldsmid* v. *Great Eastern Ry. Co.* (1) Even if the market were so crowded that no one could get into it, that would not justify any one setting up a rival market.

In *Attorney-General* v. *Horner* (2), which also concerned Spitalfields Market, the words "in sive juxta" came to be considered.

In 1902 a private Act—the City of London (Spitalfields Market) Act, 1902—was passed empowering the Corporation of London to acquire Spitalfields Market and to extend and improve it. This was followed by other Acts affecting the market—namely, the City of London (Various Powers) Act, 1914, the City of London (Various Powers) Act, 1920, and the City of London (Various Powers) Act, 1922.

The question of the days on which a market may be held came up in a second case of *Attorney-General* v. *Horner* (*No.* 2). (3)

The plaintiffs are responsible for regulating the market, and it is therefore impossible to have people going into the market or part of it and holding auction sales. The London Fruit Exchange was set up by the plaintiffs for the purpose of auctioneering fruit; and it is denied that any persons can come in of their own accord and sell by auction anywhere in the market. It is necessary to have the business of the market conducted in an orderly way. Further an auctioneer by trade has no right to insist that his trade of auctioneer

(1) (1883) 25 Ch. D. 511; (1884) 9 App. Cas. 927, 932, 936, 943, 945, 956, 960.

(2) (1884) 14 Q. B. D. 245; (1885) 11 App. Cas. 66, 75, 78, 81.

(3) [1913] 2 Ch. 140, 171, 173.

shall be carried on within the market. Here the defendants are, we say, auctioneering fruit on commission. The London Fruit Exchange was put up by the plaintiffs to meet the previous difficulty of dealing with and auctioning very large consignments of fruit.

[LUXMOORE J. Is not this the real question? Can any one claim the right to come into a market and sell by auction?]

Yes; that is the first question. Another would be, it is submitted, that of the limited accommodation available in the market in this particular case, and the fact that the plaintiffs have set aside a particular part for auction sales where there is no room for the defendants to come in. There may be an inherent right in a market for the owner to allot part for sales by auction and part for treaty sales. A general proposition cannot apply to all markets: it will probably depend upon the custom of the particular market. See the case of *Nicholls* v. *Tavistock Urban District Council.* (1) The difficulty is with regard to a person whose business it is to be an auctioneer claiming a right to come into a market at all as such. A man bringing in his own goods or deputing an agent is quite different from a man who has not got his own goods at all but is merely carrying on for profit a trade as an auctioneer. In the case of *Nicholls* v. *Tavistock Urban District Council* (1) Romer J. decided that you could sell by public auction in a market.

If there is a market in which there is no room, an owner of goods might well sell them outside the market without committing a disturbance; but the fact that there is no room in a market is no justification for levying a rival market. The owner of the market can set aside a part of the market for auction sales and not allow auction sales in any other part, therefore—even assuming that a man has the right to come in and sell by auction—he is not entitled to go into the non-auction part. The owner of the market can leave a part of the market free for private treaty sales.

The owner of goods cannot demand an auction in that

(1) [1923] 2 Ch. 18, 24.

part of the market set aside for sales by private treaty. Nobody has the right to carry on private treaty sales in the part of the market set aside for auction sales, and the same applies to the converse case. Here, whatever the plaintiffs may have done, there is no justification for setting up a rival market; not even the Crown can do it. The only way to get rid of the plaintiffs' market rights would, it is submitted, be by an Act of Parliament.

In the London Fruit Exchange there is no more room for any one other than the named lessees from the plaintiffs, who are the owners, to hold auction sales, and the defendants' sales of fruit (which they do not deny) do not seem to justify their being admitted to come in with the others, whose sales are very much more extensive and valuable.

The defendants have no right to use the description of the plaintiff Corporation as their own trade description; they are not entitled to describe themselves on trade catalogues, etc., as being in the market, which is the property of the plaintiff Corporation; further, what they give as their address, namely, as Steward Street, Spitalfields Market, is not the correct postal address.

The defendants are under no circumstances entitled to levy a rival market. The grantee of the original franchise of the market is, it is submitted, not to be confined within the original limits of Spital Square as it was in the time of King Charles II., but can extend his market "juxta." No attempt is made by the plaintiff Corporation to extend their market further than the market defined in their Act of 1902.

On the question of the levying of a rival market, see the cases of the *Dorchester Corporation* v. *Ensor* (1); *Elwes* v. *Payne* (2); *Wilcox* v. *Steel* (3); *Morpeth Corporation* v. *Northumberland Farmers' Auction Mart Co.* (4); and *Beecham Estates and Pills, Ld.* v. *Freeman & Co., Ld.* (5), a decision of Romer J.

J. M. Gover K.C., *Linton Thorp* K.C., and *H. Heathcote-Williams* for the defendants. Three questions arise for the determination of the Court: (1.) Whether the defendants' premises 36 and 37 Steward Street are within the market; (2.) Whether the plaintiffs are entitled to exclude the defendants from selling by auction within the market; and (3.) Whether the carrying on sales by auction by the defendants on the premises 36 and 37 Steward Street is actionable and can be restrained.

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(1) (1869) L. R. 4 Ex. 335, 341.

(2) (1879) 12 Ch. D. 468, 471, 473.

(3) [1904] 1 Ch. 212, 219, 221.

(4) [1921] 2 Ch. 154, 158, 160.

(5) Unreported.

With regard to (1.). The market is one limited either by metes and bounds or it is not. A market limited by metes and bounds is one the area of which is actually defined by measurement, for instance, if the charter had said that it franchised a market in Spital Square, Spital Square in those ancient times was a definite area, and it might be limited by metes and bounds. A franchise which is given in respect of an area "in sive juxta" a defined area, such as Spital Square, is not a market limited by metes and bounds. It has also been held that this is not a market limited by metes and bounds: see *Attorney-General* v. *Horner* (1); and also the second case of *Attorney-General* v. *Horner* (*No.* 2) (2) for the remarks of Buckley L.J. For this particular argument, the question seems to be, Can 36 and 37 Steward Street fairly be said to be "juxta" within the phrase "in sive juxta" Spital Square? It has not yet been possible to identify the exact boundaries of Spital Square. As the franchise was "in sive juxta" Spital Square, it has been held not to be a market limited by metes and bounds, but one which is extensible within the limits of the word "juxta," which word has been construed as meaning "near." It is submitted that these premises in Steward Street are "juxta" Spital Square. Of course one must not forget the remarks of Lord Blackburn in *Attorney-General* v. *Horner* (3), that the words "in or near" ("in sive juxta") a place should not be construed so as to enable a market to be extended continuously; and regard should also be paid to the remarks of Brett M.R. in the same case in the Court below (4) as to the extent of a market granted without metes and bounds.

(1) 14 Q. B. D. 245; 11 App. Cas. 66.
(2) [1913] 2 Ch. 140, 175, 178.
(3) 11 App. Cas. 66, 81.
(4) 14 Q. B. D. 245, 255.

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No market of course can be entirely limited by metes and bounds, and one limited without must have some maximum limit. There must be an area of some kind over which the franchise extends. But the boundaries of this area do not depend solely on the volition of the market owner. If these premises in Steward Street are "juxta" Spital Square, then they are within the area of the franchise, and the owner of the market cannot say that he declines to regard them as part of the market. These premises are, it is submitted, within the market, and the plaintiffs are actually getting tolls for the use of these premises.

What are the obligations of a market owner to the public? With regard to this very charter governing Spitalfields Market, the remarks of Lindley L.J. in *Attorney-General* v. *Horner* (1) must be borne in mind. A franchise is the right for the grantee for himself to sell exclusively in one place within the franchise area to buyers and to take tolls. Really it is a restraint upon public trade. Being a monopoly granted to an individual—a monopoly granted at the expense of certain common law rights of the public—certain obligations were thrown upon the market owner. One was to provide reasonable accommodation for all members of the public wishing to buy or sell: see *Austin* v. *Whittred* (2); *Mosley* v. *Walker*. (3) Compare *In re Islington Market Bill* (4), where the remarks of Littledale J. when dealing with the third and fourth questions are relied on. That principle is one which applies not only to markets but to every franchise which is in the nature of a monopoly. See also *Aiton* v. *Stephen* (5) for the remarks of Lord Cairns L.C. What the learned Lord Chancellor says there (6) (beginning "My Lords, I apprehend that your Lordships, etc.") is a proposition of the widest possible character.

The whole case now before the court turns upon the plaintiffs giving what the defendants say is an exclusive monopoly to certain persons to deal with anything sold by auction and sold by sample.

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(1) 14 Q. B. D. 264.

(2) (1747) Willes Rep. 623, *n.* at p. 628.

(3) (1827) 7 B. & C. 40, 51, 55.

(4) 3 Cl. & F. 513, 515, 518.

(5) (1876) 1 App. Cas. 456, 460.

(6) Ibid. 460.

It is submitted that this is a sale in the market. The plaintiffs cannot exclude any would-be buyer or seller; they must find reasonable accommodation for all classes of sellers or buyers, that is, those who wish to sell by auction, provided of course that there is a right to sell by auction. On this question of undue discrimination, see *Kruse* v. *Johnson* (1) for the remarks of Lord Russell of Killowen L.C.J.

The franchise market owner cannot prevent persons entitled, from selling in the market by pleading that owing to his own action there was no room in the market, that is, he himself preventing the person entitled from exercising his legitimate rights. This action by the market owner would afford a good defence in any proceedings to restrain any one selling outside the market: see *Prince* v. *Lewis.* (2)

Further the defendants are entitled to sell by auction in the market, subject to any reasonable arrangements which the owner may make.

[LUXMOORE J. It seems to depend on what the right to sell by auction is: whether it is a right to sell by auction your own goods and limit it to that or whether you are entitled to sell other people's goods.]

See the case of *Magistrates of Edinburgh* v. *Blackie.* (3) Though this case did not deal with common law market rights, it may be useful as an authority by way of analogy. The principle is the same where you have a charter market.

It is further submitted that all members of the public have a right as members of the public to come into this market and sell by auction subject to all reasonable regulations.

A member of the public is entitled of his own volition to come in and determine the method by which he sells. It is immaterial whether the goods he sells are his own goods or whether they are other people's goods sold on commission. Unless there is some special custom to the contrary, it is immaterial whether he sells wholesale or retail. It is of

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(1) [1898] 2 Q. B. 91, 99. (2) (1826) 5 B. & C. 363, 369, 371, 372.
(3) (1886) 11 App. Cas. 665, 670, 675, 679, 683.

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course admitted that this market has been for a considerable time wholesale, but that does not matter here. The plaintiffs must give reasonable consideration to every class of the public who desire reasonable use of the market. The market owner cannot let the whole of the market for some particular purpose and then say that it cannot be used for any other purpose. The defendants are entitled to come in to sell by auction as much as by private treaty. What the plaintiffs say is, you can sell by private treaty if you can get accommodation, but in any case you are not entitled to sell by auction.

On the question whether selling by auction is not an ordinary and proper method of selling anywhere, see the case of *Haynes* v. *Ford* (1); *Hailsham Cattle Market Co.* v. *Tolman* (2) for Sargant J.'s remarks; and compare *Wiltshire* v. *Willett.* (3) For the principle that at common law a man may fix the condition at which he sells, see *Nicholls* v. *Tavistock Urban District Council* (4), and especially Romer J.'s judgment.

[LUXMOORE J. The declaration you ask for could only be without prejudice to the rights of persons who have tenancy agreements.]

Yes, but a market owner cannot part with the entire available area in the market to one section of the public.

His charter rights and obligations do not extend to letting for more than a week, and those obligations, subject to that, are on a common law basis. We are entitled to sell by auction in the actual space in the main market.

Further on the question whether in the circumstances of this particular case, the defendants are doing something which is an unlawful infringement of the plaintiffs' rights and should be restrained—so far as they are selling on their own business premises, and particularly so far as they sell by sample—it would not be an infringement. In an ordinary charter market at common law the market owner is not entitled to complain of a man within the area of the franchise

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(1) [1911] 2 Ch. 237, 248, 252, 255.

(2) [1915] 1 Ch. 360, 367.

(3) (1861) 11 C. B. (N. S.) 240, 244.

(4) [1923] 2 Ch. 18, 24.

—but not within the market—selling goods in the ordinary way in his own shop or on his own premises. It is not carrying on a rival market nor is there any disturbance of market rights. See Pease and Chitty on Markets, at p. 79. See also *Mayor, etc., of Macclesfield* v. *Chapman* (1), where the general principle is laid down. Also *Mayor of Macclesfield* v. *Pedley* (2); *Mayor of Penryn* v. *Best* (3); *Mayor, etc., of Manchester* v. *Lyons* (4); *Goldsmid* v. *Great Eastern Ry. Co.* (5) for Lindley L.J.'s remarks. Whether selling in one's own shop might be a disturbance of the market, see the judgment of Williams J. in *Wiltshire* v. *Willett* (6), and that of Byles J.

It is submitted that there is no authority which says that there is justification of the general principle in the case of auction sales. In any case the authorities show that the selling of marketable goods on a man's own premises—although near the market—is not an actual disturbance if you sell by sample: *Mayor of Brecon* v. *Edwards* (7) for some remarks of Martin B. during the arguments and those of Wilde B. and the judgments of the learned judges.

On the question whether the defendants are carrying on a rival market, what they are doing in fact is exactly the same thing as they would be doing as an individual member of the public if they were doing it inside the market and nothing more. It is assumed that as members of the public the defendants are entitled to sell by auction; they are prepared to pay tolls and to do on their premises exactly what they could do and to perform all the obligations which they would have to perform if they were within the market.

As regards the cases cited on behalf of the plaintiffs. First, *Mayor, etc., of Dorchester* v. *Ensor.* (8) That case shows that if the market had been held on the same day as the rival market, it does not matter; but as it was not on the same day, it must be shown that the market was damaged. The case differs from *Fearon* v. *Mitchell.* (9)

(1) (1843) 12 M. & W. 18.
(2) (1833) 4 B. & Ad. 397, 402.
(3) (1878) 3 Ex. D. 292, 302.
(4) (1882) 22 Ch. D. 287.
(5) 25 Ch. D. 511, 548.
(6) 11 C. B. (N. S.) 240, 244.
(7) (1862) 1 H. & C. 51, 56, 57, 61.
(8) L. R. 4 Ex. 335.
(9) (1872) L. R. 7 Q. B. 690, 694, 697, 698.

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[LUXMOORE J. It is really a question of fact in each case whether what is done constitutes a rival market or not: see Blackburn J.'s remarks in his judgment in *Fearon* v. *Mitchell.* (1)]

Yes; the learned judge there came to the conclusion it was a rival market.

Another case relied on by the plaintiffs was *Elwes* v. *Payne.* (2) The facts there were entirely different from these, the decision turning upon the language of the charter and on the fact that they were inviting the public to bring things they wanted to sell there, and also to come and buy. See also the case of the *Mayor and Commonalty of the City of London* v. *Low.* (3) It is submitted that no analogy exists between that case and the present one.

The case of the *Mayor, etc., of the City of Birmingham* v. *Foster* (4) is in point; this was not referred to by the plaintiffs. Another case relied on by the plaintiffs was *Hailsham Cattle Market Co.* v. *Tolman.* (5) There again the facts are entirely different from this case now before the Court. See also *Morpeth Corporation* v. *Northumberland Farmers' Auction Mart Co.* (6) There of course the learned judge held on the facts that what was done did constitute a rival market. The case also of *Wilcox* v. *Steel* (7) is useful to be referred to. The cases cited on behalf of the defendants make it clear, it is submitted, that if what they have been doing does not constitute a rival market but does constitute what would otherwise be an actual disturbance of the market, mere want of accommodation in the market is a sufficient defence to an action for disturbance and would be a complete answer in these proceedings. No authorities go so far as saying that if any one desiring to exercise his rights as a member of the public to sell in the market is refused because he desires to sell in a particular way, that is by auction, that the plaintiffs could succeed in an action. In fact no action would lie for disturbance even if the disturbance amounted to carrying on a rival market.

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(1) L. R. 7 Q. B. 690, 694, 697, 698.

(2) 12 Ch. D. 468, 471.

(3) (1879) 42 L. T. 16, 19.

(4) (1894) 70 L. T. 371.

(5) [1915] 1 Ch. 360, 367.

(6) [1921] 2 Ch. 154, 160.

(7) [1904] 1 Ch. 212, 220

The case of *Goldsmid* v. *Great Eastern Ry. Co.* (1) so far as it is supposed to throw some light on what constitutes a rival market has, it is submitted, no resemblance to this now before the Court. Throughout the judgments the learned Lords Justices show that what they are thinking of is the mere point that arose in *Prince* v. *Lewis* (2), the want of accommodation and nothing more; not the case of men who come to the market and desire to sell by auction and the owner of the market deliberately excludes them. As to want of accommodation, Lord Selborne's remarks in the same case in the House of Lords should be read, also those of Lord Blackburn.

The plaintiffs as market owners have an obligation at common law to provide reasonable accommodation for the defendants and other members of the public desiring to sell by auction within the market. That obligation is not answered by their saying that there is no room. Their obligations at common law consist in considering the interests of the public in restraint of their trade: they must so adjust the arrangements of their market as to meet all reasonable demands of trading in the market. It is not for the market owner to say, notwithstanding there is a section of the selling public who desire to sell by auction, this part should be devoted to, say, a flower market. It is a market for a great many kinds of goods; it is a general market. If he could lay down who is to sell and who not, he could really destroy the market. The lease to the Brokers' Association is really taking it out of the market. Further the market owners cannot properly lease or let market space for non-selling or buying purposes so as to leave insufficient accommodation for the public. Again, although a market owner may for the sake of general order and convenience make reasonable regulations—including the assignment of a particular part or parts of the market for particular kinds of goods or methods of sale—

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(1) 25 Ch. D. 511, 515, 524, 534, 538, 545, 554; 9 App. Cas. 927, 943, 944, 945, 959.

(2) 5 B. & C. 363.

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they cannot properly do this so as to give a monopoly to a particular person or persons, and they must not make such arrangements or regulations as would prevent them from providing reasonable available space for other would-be sellers by auction.

Further, the defendants are in the circumstances entitled to sell by auction and to have reasonable facilities for so selling, and provided the defendants are willing to pay tolls, what they have done is not an actionable disturbance of the market. Lastly, the defendants are not carrying on a rival market, but if and so far as the defendants' activities do constitute a disturbance of the market, want of accommodation affords a complete answer. The plaintiffs are deliberately and without excuse excluding the defendants, and this affords a good defence in law.

Wilfrid Greene K.C. in reply. First, on the question of the defendants being in the market, "in sive juxta," these words are simply something which adds to the privilege of the market owner: see *Attorney-General* v. *Horner*. (1) They are not words which confer on somebody else the right to say what the limits of the market shall be. Further, the boundaries of this market are defined by their Act of 1902.

The defendants' contention that what they are doing does not constitute the levying of a rival market, and that even if it does there is no authority to the effect that a rival market can be restrained where it consists of selling by auction and the seller has asked for permission to sell in the market, has been refused and is willing to pay tolls, is unfounded in law.

Here the holding of auction sales is the levying of a rival market, because the person who provides a place where buyers and sellers can meet and make contracts of sale and purchase is creating a market. The defendants are claiming the right to carry on the practice of auctioneers. The owner of a market is entitled to allocate different parts of the market to different types of selling: it is a matter for the market owner to decide and not for the Courts or for individual members of the public to interfere in. The owner is under no obligation whatever to do so.

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(1) 11 App. Cas. 66.

[LUXMOORE J. Are there not cases which lay down that a member of the public can be a trespasser in a market ?]

Yes, the basis being that the owner of the market is the owner of the soil and has the right to exclude.

[*J. M. Gover K.C.* referred to Lush J.'s remarks in *Lax* v. *Corporation of Darlington.* (1)]

It is not correct to suggest that the defendants would be entitled to the exclusive occupation of some portion of this area for the purpose of putting up a rostrum and showing their samples. That can only be done by the grant and concession of the market owner. *Wilcox* v. *Steel* (2), which is, it is submitted, a useful authority for showing what is a levying of a rival market ; *Great Eastern Ry. Co.* v. *Goldsmid* (3), for Lord Selborne's remarks ; *Lord Midleton* v. *Power.* (4)

The fact that the particular form of levying a rival market consists in providing a place where you act as an agent for a number of vendors is irrelevant in considering whether it is a rival market or not and is irrelevant in considering the question of justification for a disturbance.

As to the competency of the counterclaim, see the case of *Magistrates of Edinburgh* v. *Blackie* (5), where reliance is placed on Lord Herschell L.C.'s remarks at the top of p. 671 ; and also *Duke of Atholl* v. *Torrie.* (6) An individual has no right to bring this action, but if he has he must prove special damage. Here a declaration—with or without an injunction—cannot be granted on the facts of this case. If such a right does exist, it is not a right in an auctioneer.

As to the defendants' contention that the plaintiffs as market owners have an obligation at common law to provide reasonable accommodation for the defendants and other members of the public to sell by auction within the market : this is, it is submitted, wrong. If the market owner is confronted with different types of selling in his market, he is

(1) (1879) 5 Ex. D. 28, 29.
(2) [1904] 1 Ch. 212, 221.
(3) 9 App. Cas. 927, 943, 945.
(4) (1886) 19 L. R. Ir. 1, 7, 18.
(5) 11 App. Cas. 665, 671.
(6) (1852) 1 Macq. 65, 72.

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entitled to allot so much for one type and so much for another, and he can do that by a permanent allocation or an allocation ad hoc. The proposition that because a man wishes to come and sell by auction he has a right to have a place given him is strongly contested.

There is no particular virtue in selling by auction which gives a man the right to be preferred to another competing candidate for the space who wishes to sell by private treaty. The defendants must first show—in order to obtain the declaration they ask for—that they are entitled to get into the market at all, before the question of how they can sell arises. There is no right whatsoever for the defendants insisting on having accommodation to sell by auction, there is no right in any member of the public to insist on having a tenancy; this right is a matter of the volition of the market owner, and the plaintiffs could terminate every single weekly tenancy in the market. The defendants are in no better position than private treaty sellers who want to go in and find the market full up.

The plaintiffs are entitled to make what proper regulations they like; they are the market authority and as such have got the power to regulate the market. If the market authority, on the ground of the franchise, erects a structure, it must be competent to that authority to decide whether a particular part of that structure is proper to be used for a particular purpose. The market owner is not bound to give a tenancy to anybody, he could leave the place vacant or he could exclude every single member of the public.

J. M. Gover K.C. in reply on the counterclaim. The plaintiffs' contention that the counterclaim is really a relator's action and that we have no right to bring it at all is wrong.

[A discussion ensued on the question of special damage and the form of declaration the Court could make under the circumstances.]

J. M. Gover K.C. referred to *London & North Eastern Ry. Co.* v. *British Trawlers Federation* (1) for the purpose of analogy. On the question of the necessity of it being a relator's action, it is submitted, on the authorities, that if the defendants can show that they have a special interest in the subject-matter of the declaration over and above the general public, it is not necessary to have a relator action under the fiat of the Attorney-General; see the remarks of Swinfen Eady J. in *Marriott* v. *East Grinstead Gas and Water Co.* (1)

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(1) (1934) 50 Times L. R. 275.

Cur. adv. vult.

1934. Nov. 30. LUXMOORE J. The Corporation of the City of London claims in this action a declaration that certain premises known as Nos. 36 and 37 Steward Street are not within Spitalfields Market. They also claim certain injunctions against the defendant company as being necessary to protect them in the enjoyment of their rights and privileges as owners of that market; the main allegation against the defendant company being that they have held at Nos. 36 and 37 Steward Street, auctions of goods similar to those sold in the market; and have thereby either levied a rival market or caused a disturbance of the rights and privileges of the Corporation in respect of their market.

The defendant company admits that it has held sales by auction of fruit, vegetables and other commodities at Nos. 36 and 37 Steward Street, and that it intends to continue so to do; and contends that Nos. 36 and 37 Steward Street are within Spitalfields Market, and that what is being done there is nothing more than that which every member of the public is entitled to do within the market. It further contends that if Nos. 36 and 37 Steward Street are not within the market, it is justified in its actions because the Corporation has refused to allow it the necessary facilities for selling by auction within the market. The defendant company also denies that there has been any levying of a rival market or other disturbance of or interference with the rights and privileges of the Corporation as owner of the market, and counterclaims for a declaration that the defendant company is entitled to sell its goods by auction within the market upon payment of the reasonable and customary tolls.

(1) [1909] 1 Ch. 70, 78.

There is but little dispute of fact, but the questions raised are important and some of them are difficult to solve. Before attempting to do so it is necessary to state the facts material to be considered. The right to hold the market, known as Spitalfields Market, was originally granted by Letters Patent dated July 29, 1682, by His Majesty King Charles II. to one Balch, his heirs and assigns. The validity of this grant has already been contested in these Courts and was finally established by a decision of the House of Lords in *Great Eastern Ry. Co.* v. *Goldsmid.* (1) The Letters Patent are in latin. They start with a recital which in the agreed translation reads as follows: "Whereas by a certain inquisition indented taken at Hick's Hall in St. John Streete in the County of Middlesex on the seventeenth day of July in the 34th year of our reign by virtue of our certain writ of ad quod damnum lately issued out of our Chancery and annexed to the same inquisition by the oaths of good and lawful men of the County aforesaid, it was found that it will not be to the damage or prejudice of us or of others if we should grant to John Balch Esquire named in the said writ his heirs and assigns, That he his heirs and assigns may have and hold two markets every week whereof the first on Thursday and the other on Saturday in or near to a certain place called the Spittle Square specified in the said Writ as by the record thereof it more fully appears." The Letters Patent continue: "Know ye now that we of our special grace and of our certain knowledge and mere motion have given and granted and by these presents for us our heirs and successors do give and grant to the aforesaid John Balch and his heirs that he his heirs and assigns henceforth for ever may have hold and keep and each of them may have hold and keep and they and each of them shall and may be able to have hold and keep two markets every week whereof the first on Thursday and the other on Saturday in or next to a certain place called the Spittle Square in the Parish of Stepney otherwise Stebonheath in the County aforesaid together with all dues tolls piccage stallage and other profits advantages and

(1) 9 App. Cas. 927.

emoluments whatsoever to such markets in anywise belonging appertaining issuing or arising or with the same usually had and enjoyed. To have hold and enjoy the aforesaid two markets tolls dues piccage stallage and other all and singular the premises by these presents granted or mentioned to be granted to the aforesaid John Balch his heirs and assigns to the use and behoof of the aforesaid John Balch his heirs and assigns for ever." There is no description of the locality in which the market is to be held other than is to be found in the words "a place called Spittle Square." This description is introduced in the original Letters Patent by the words "in sive juxta." These words have been translated in one place by the words "in or near," and in another place by the words "in or next." The meaning of the words "in sive juxta" has also been considered in these Courts and in the House of Lords on the footing that their correct translation is "in or near," and I am bound to accept that translation.

The case to which I have referred is *Attorney-General* v. *Horner.* (1) It was held in both the Court of Appeal and the House of Lords that the market granted by the Letters Patent was not a market limited by metes and bounds; and that the grant permitted the extension of the market beyond Spittle Square into the surrounding area if the market owners thought fit and had the means of so doing. Lord Blackburn however was not prepared to accept the view that the grant permitted any and every extension however great. A careful consideration of the decision leads me to the conclusion that the grant of the market "in or near Spittle Square" authorizes a gradual extension of the market to a point which at the date when the Letters Patent were granted could properly be held to be reasonably near that Square.

I am satisfied that the original site of Spittle Square is that part of the present market which lies to the east of the dotted line shown on the plan "P.5" as dividing into two parts the site delineated thereon and surrounded by a green verge line. At the date of the conveyance of May 8, 1902, the part of the present market, to which I have just referred as being identical with the original site of Spittle Square, was covered by a building in which the market was then held, and in this building there were certain internal streets known respectively as North Street, South Street, East Street and West Street. By the conveyance of May 8, 1902, this part of the present market was conveyed to the Corporation by the then owners together with " the market, houses, messuages, taverns, public houses, shops, stalls, stables, warehouses and other erections and buildings now standing thereon " ; and all the interest of the conveying parties in the land surrounding the site, " and forming part of the streets known as Lamb Street, Commercial Street, Brushfield Street and Crispin Street . . . . subject to such rights over or affecting the same . . . . as are vested in . . . . the public." In addition to this the market and the rights and privileges incident thereto were conveyed to the Corporation. The conveyance was made subject to and with the benefit of (1.) a lease which was then subsisting in favour of one Robert Horner of the whole of the property thereby conveyed, and (2.) a deed made in June, 1885, which contains nothing material to the matters to be dealt with in this action.

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(1) 14 Q. B. D. 245; 11 App. Cas. 66, 81.

On July 31, 1902, a private Act of Parliament intituled the " City of London (Spitalfields Market) Act, 1902," was passed. The preamble consists of a number of recitals including one in the following terms : " And whereas it is expedient that the Corporation should be empowered to maintain extend and improve Spitalfields Market and to sell lease or dispose thereof as hereinafter provided and to acquire all the interest of the said Robert Horner in the said market." Sect. 3 contains a definition of " the undertaking " as meaning " the said market known as Spitalfields Market and the lands forming the site thereof and adjoining thereto together with all dues tolls piccage and stallage and other profits and advantages and emoluments whatsoever to such market in anywise appertaining as granted by letters patent to one Balch his heirs and assigns, also all lands shops stalls stallages standing places benches buildings works and conveniences used occupied or enjoyed with or part or parcel of the said market and lands or incident thereto, and all the powers rights franchises privileges and emoluments appertaining to arising out of exercised or enjoyed in connection with the said market lands and premises or in any way capable of being exercised and enjoyed therewith." By s. 5 the Corporation is empowered to acquire the undertaking "so far as not already acquired by the Corporation." For the purposes of the section "lands" are "to include all freehold and leasehold interests in the undertaking (other than the interests of the lessees of shops stalls stands and other market conveniences), as well as the lands adjoining the site of Spitalfields Market and in the parish of Christ Church Spitalfields" as shown on the deposited plans. The section also contains a statement that "The lands forming the site of Spitalfields Market and the lands adjoining thereto are:—Lands bounded by and including the following streets:—On the east by Commercial Street on the north by Lamb Street on the west by Crispin Street and on the south by Brushfield Street, and the Corporation may subject to the provisions of this Act and subject to any public rights over or affecting the same or any part or parts thereof enter upon take and use for the purposes of this Act all or any of the said lands." These sections appear to me to constitute a statutory definition of the market at the date of the passing of the Act. By s. 9 the Corporation is given power to purchase, in addition to those included in the definition, any lands which they may require for the purpose of enlarging and improving the market or the approaches thereto. The section provides that any lands so purchased "together with all buildings shops stalls works and conveniences erected thereon" shall for all purposes form part of and be included in the undertaking. Sect. 11 provides that, subject to the provisions of the Act, the undertaking shall be carried on by the Corporation, who may exercise all franchises, market and other rights appertaining to the undertaking so far as purchased or taken and as enlarged and improved by the Corporation. Sect. 16 gives power to the Corporation to make such by-laws as they think fit for the following purposes: "For regulating the days and hours

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upon which and during which Spitalfields Market may be open or closed: For the licensing of porters employed in the said market: For the collection of tolls and for preventing the evasion thereof: For the keeping the said market and approaches thereto in a cleanly and proper state: For directing the manner in which carts and other vehicles bringing market produce to the said market or taking the same therefrom shall enter or leave the said market or shall stand in the said market or the roads or streets intersecting the same: For preventing nuisances or obstructions in the said market or the immediate approaches thereto: For the closing from time to time of any of the roads intersecting the said market except for market traffic: And generally for the regulation and government of the said market and the immediate approaches thereto: But bye-laws under this section shall not come into operation until they are allowed by the Local Government Board." No by-laws have in fact been made. Sect. 29 provides that the Corporation shall not let or otherwise dispose of any stall or standing in Spitalfields Market for a longer period than one week. Under the provisions of this Act, the Corporation acquired the premises in Brushfield Street, Steward Street and Fort Street respectively, which are shown on the plan " P.5 " as surrounded with a purple verge line.

On August 7, 1914, the City of London (Various Powers) Act, 1914, was passed. The preamble contains recitals to the effect that the Corporation is the owner of Spitalfields Market, and that it is expedient that certain of the streets forming the approaches to the market and in the neighbourhood thereof should be widened. Sect. 5 empowers the Corporation to execute improvements which include the widening of Spital Square and certain streets in the neighbourhood of Spitalfields Market as then constituted. I should point out that the Square referred to as Spital Square in this section is not identical with the Spittle Square referred to in the Letters Patent constituting the grant of the market. The site of the last mentioned Square did not comprise any part of the Spital Square referred to in the 1914 Act. By s. 12

of this Act the Corporation is empowered to take and use certain specified lands "for the purposes of the improvements or for the purposes of providing space for the erection of buildings adjoining or near thereto or for the purposes of recoupment or exchange or for any purpose in connection with Spitalfields Market." The Corporation duly acquired land for the authorized street improvements and also the land which is shown on "P.5" as surrounded by a grey verge line. On June 7, 1920, Robert Horner by an assignment of that date assigned to the Corporation all his interest in Spitalfields Market as defined in the Act of 1902, including the lease to which I have already referred.

On July 2, 1920, a further Act was passed intituled "City of London (Various Powers) Act, 1920," whereby the times for the completion of the improvements authorized in respect of Spitalfields Market were extended.

On May 31, 1922, a further Act was passed intituled "City of London (Various Powers) Act, 1922." Sect. 3 (which is the interpretation section) provides that the words "The market" mean "the Spitalfields Market of the Corporation from time to time existing." Sect. 5 empowers the Corporation to execute street improvements in the neighbourhood of the market. Sect. 6 confers on the Corporation power to take lands "for the purposes of the improvements or for the purposes of providing space for an extension of the market and the erection of buildings adjoining or near thereto respectively or for the purposes of recoupment or exchange or for any purpose in connection with the market." Sect. 8 confers a power to stop up certain streets, the soil of which, after the stopping up, is to vest in the Corporation. Sect. 14 extends the time for purchase of land under the Act of 1914. Sect. 19 provides: "It shall be lawful for the Corporation on every day of the week except Sunday to hold keep and maintain the market." It also contains a provision authorizing the Corporation to levy receive and recover market dues, tolls, and such like payments at or in respect of the market from the sellers or salesmen of commodities in the market. There is a provision that the last mentioned section is not to operate unless and until the Corporation complete the improvements and the widening of Spital Square on the south side of Lamb Street and of Brushfield Street authorized by the Act of 1914. Under the powers conferred by the 1922 Act, the Corporation acquired that part of the land shown on plan " P.5 " as surrounded by the green verge line which lies to the west of the dotted line running approximately through the middle of the whole plot.

In due course the improvements authorized by the 1914 Act and the stopping up of the streets authorized by the 1922 Act were completed, and in the result what is in effect one large building now covers the whole of the plot surrounded by the green verge line on plan " P.5." Before the improvements were made, there was on the eastern part of the site, namely, the part purchased by the Corporation in 1902, one large building, which I will call " the original market." On each street frontage there was a continuous line of buildings. In some parts the buildings were three stories high, while in other parts they were only two stories high. There were, with a few trifling exceptions, no basements to any of the buildings forming the frontages to the streets adjoining the original market. On the ground floor facing the respective streets there were shops or warehouses, the upper stories or story being used mainly for residential purposes. The internal space comprised in the original market was covered in, and the floor space was divided into stands which were occupied by the persons or firms engaged in selling their goods in the market, as were for all practical purposes the shops or warehouses to which I have already referred. The improvements effected after the passing of the 1922 Act included the erection on the western side of the " original market " of a building to which I will refer as the " western extension." The frontages of the " western extension " to Brushfield Street, Steward Street and Lamb Street respectively consisted of a continuous line of buildings comprising three stories in height with basements underneath. This line of buildings was divided into shops or warehouses, the basements being used for storage and the upper floors for offices, the various shops or warehouses, basements and offices being let to persons or firms engaged in selling goods in the market. The internal space in the " western extension " is covered in, and the floor space is divided into stands which are also occupied by persons or firms engaged in selling their goods in the market. The " original market " and the " western extension " constitute what I will refer to as the " main market." The " main market " now comprises sixty-eight shops or warehouses and one hundred and eighty-eight stands. I include in the shops or warehouses the basements thereunder and the upper stories. At the date of the trial these shops or warehouses were let to fifty different tenants, and the one hundred and eighty-eight stands were let to one hundred and fourteen different tenants. Apart from the stands there is no space in the " main market " or in the streets or buildings surrounding it upon which members of the public desiring to sell fruit, vegetables and other commodities can expose their wares for sale.

Before the erection of the London Fruit Exchange on the site in Brushfield Street shown on plan " P.5 " by the pink colour on one of the sites surrounded by a grey verge line, the business of selling fruit and vegetables in the " original market " and the " western extension " had mainly been carried on by private treaty by the tenants of the various shops, warehouses and stands, but auction sales were from time to time held not only in the " original market," but also, after the " western extension " was completed, in the " main market." The evidence satisfies me that such auction sales were held at least as early as the year 1897. The auction sales continued to be held down to a time shortly after the outbreak of the Great War, and were restarted shortly after the time when the Corporation, having acquired Robert Horner's interests in the market, became responsible for its conduct. The earlier auction sales, to which I have referred, took place during the period when Robert Horner was conducting the market in that part of the " original market " which was occupied by stands. They were held once or twice a week between the beginning of September of one year and the end of April in the following year. The auctions were held in spaces allotted for the purpose by Robert Horner, and at times when the business in the market was slack, generally at about 2 o'clock in the afternoon. There was no difficulty in obtaining facilities for holding an auction and no inconvenience was apparently caused to any one by the holding of these auctions. After the Corporation took over the conduct of the market the same practice was followed. A trader desirous of holding an auction advertised the fact, and on the morning on which the auction was to be held, the superintendent of the market allotted a space for it. Shortly before the auction took place, a bell was rung by an official of the Corporation to warn the persons in the market that the auction was about to take place.

I am satisfied that no inconvenience was caused by any of these auctions. It is true that the market superintendent, Major Millman, in his evidence stated that these auctions became very objectionable owing to the ringing of the bell. I am constrained to say that I was not favourably impressed by Major Millman's evidence, and I prefer the evidence of the witnesses called on behalf of the defendant company on this point. The auction sales continued in the "original market" until 1924. After that date they were held in several different premises belonging to the Corporation—namely, 84 Brushfield Street, Shorter's Warehouse in Crispin Street, 28 Spital Square and 48–54 White Lion Street, and also at Chapel Yard, 27A Spital Square, which was at the material dates in the occupation of Mr. Julius Lyons, the person who acted as the auctioneer at the sales there. The auction sales held in the premises outside the "main market" caused no inconvenience to any one engaged in selling their goods in the "original market," or in the "main market." The last sale by auction before the opening of the London Fruit Exchange took place on July 30, 1929. After that date the Corporation has declined to allow any facilities for sales by auction to any person, company or firm other than the persons, companies or firms constituting or interested in the London Fruit Exchange Brokers' Association, Limited.

The London Fruit Exchange was built in these circumstances. Shortly after the Corporation acquired Robert Horner's interest in the market, Major Millman was appointed by the Corporation to be the superintendent of the market, and he suggested to the Corporation the desirability of providing Spitalfields Market with adequate facilities for the sale by auction of foreign fruit. It is not necessary to go into the preliminary history to any great extent. It will, I think, be sufficient to say that in the result, the Corporation entered into negotiations with four limited companies concerned in the sale of foreign fruit and carrying on the business of fruit auctioneers in Pudding Lane, under the style of the London City Fruit Brokers' Association. The names of these four firms are John & James Adams & Co., Ld., M. Isaacs & Sons, Ld., Keeling & White, Ld., and Knill & Grant, Ld. The Corporation included in these negotiations another limited company, Goodwin Simons London Ld., and a firm carrying on business under the style of J. C. Houghton & Co. The result of the negotiations was the building of the London Fruit Exchange, which contains two large auction rooms and all the necessary accommodation and requirements for the carrying on of the business of selling fruit by auction. The major portion of this building was leased by the Corporation to a company called the London Fruit Exchange Brokers' Association, Ld., incorporated for the purpose by the companies and firms whose respective names I have just mentioned. The lease was granted by a deed dated July 4, 1930. It is made between the Corporation, therein called the lessors, of the first part, the London Fruit Exchange Brokers' Association, Ld., therein called the lessees, of the second part, and the said five companies and the said firm of the third part. The company and the firm are called the guarantors. The lease is for a term of twenty-one years determinable at the end of the seventh or fourteenth year at the option of the lessees. The annual sum payable by the lessees during the continuance of the term is 24,000*l.*, of which 14,000*l.* is in respect of rent and 10,000*l.* is in lieu of tolls. The lessees covenant among other things not to use the premises for any other business than that of the sale by auction or otherwise of fruit, vegetables or other commodities of the like nature and as offices in connection therewith. They also covenant to carry on and develop to the utmost of their power the business of the sale by auction of fruit, vegetables and other commodities of the like nature, and to comply with the by-laws, rules, orders and regulations for the time being in force governing Spitalfields Market so far as the same may be applicable to the demised premises. The lessees went into possession of the demised premises before the lease was granted, and sales by auction began in September, 1929. A question arose as to the terms on which they entered. I am satisfied from the contemporaneous documents that it was an important term of the negotiations that the lessees should be given the sole right to sell by auction in the market, fruit, vegetables and such like commodities. The Corporation was apparently willing to concede this, but it was subsequently advised that it was inexpedient to enter into any covenant to this effect ; and ultimately the lessees, with I think some reluctance, agreed to take the lease in its present form and without any such covenant on the receipt of a letter from the Corporation, the terms of which were agreed between the Corporation and the other parties to the lease. The letter is in these terms and is dated June 20, 1930 : " As requested, I am writing to record the result of the conference with the Central Markets Committee on December 11, 1929, which was attended by Mr. Isaacs, Mr. Greenwood, Mr. Simons and Mr. Drake. It is understood that the protection which your association and its constituent members desired before moving to Spitalfields was that no trade or business of any kind in fruit or vegetables, or other like commodities, should at any time be carried on in the parts of the London Fruit Exchange and Auction Sales Building, not included in the lease to your association, and further that the Corporation would take all measures within its power to secure that no auction sale of fruit, vegetables or other like commodities should at any time be held in the Spitalfields Market or in the City of London or in any market under the control of the Corporation.

The Corporation are advised that they cannot either by way of provision in the lease to be granted to your association, or otherwise, undertake that your association have this measure of protection. You may, however, rest assured that the Corporation will be vigilant to see that their market rights as owners of Spitalfields Market or otherwise are not infringed, and it is obvious that the special position of your association as lessees under the proposal will then be substantially safeguarded."

From the time when the lessees entered into possession of the London Fruit Exchange and the auction sales were started there, the Corporation have consistently refused to consent to the holding by any person, firm or company of any sale by auction outside the London Fruit Exchange or within it, except by one or other of the companies or firms constituting the London Fruit Exchange Brokers' Association, although requests to be allowed to hold auction sales within the market have been presented to the Corporation by, among others, the defendant company. The defendant company has, notwithstanding the refusal by the Corporation, held a number of auction sales at offices rented by it at Nos. 36 and 37 Steward Street, and this action has resulted. The defendant company has claimed that their offices are within Spitalfields Market, and the first declaration sought by the Corporation in this action is framed to negative this claim. The market, as I have already stated, has been held to be one which is not limited by metes and bounds. The actual site of the market is left indeterminate by the original charter, but under that charter it is, as was held in the House of Lords in *Great Eastern Ry. Co.* v. *Goldsmid* (1), open to the market owners to fix the extent of the market within the permitted limits—namely, in or near Spittle Square. Further, under the various Acts to which I have referred, the Corporation, as the market owners, are entitled to widen the extent of their market. This statutory power, in my judgment, enables the Corporation to extend their market beyond the limits fixed by the charter. But it is to be observed that the powers of extension available

(1) 9 App. Cas. 927.

to the Corporation, whether under the charter or by statute, are exercisable voluntarily by the Corporation. It is I think settled law that where a market is granted, the market owner may either permit every place within the specified limits of the market to be the place where articles may be sold, or he may, if he thinks fit, fix upon a particular place within which sales may take place; and he may say that different places shall be appropriated to the sale of different articles. But it is always a question of fact whether there has been in the particular instance an appropriation of any particular place: see *Mosley* v. *Walker* (1), per Bayley J.

It appears from the evidence in the present case that the Corporation has, since its acquisition of the market in 1920, demanded and obtained payment of sums of money from a number of persons or firms engaged in the sale of fruit, vegetables and other like commodities in shops and premises outside the area occupied by the "main market" and the surrounding streets. Some of these persons and firms have occupied and still occupy premises leased to them by the Corporation, while others have occupied and still occupy premises in which the Corporation had no interest. From 1921 onwards these payments were designated in the books of the Corporation as tolls. A document, 49 F.1, was prepared for the purposes of this action on behalf of the Corporation containing a list of the premises in respect of which the so-called tolls were paid, the names of the persons or firms making the payments, the amounts paid and the periods for which the payments were made. No evidence has been offered on behalf of the Corporation to explain the circumstances under which these payments were made, although it must be available to the Corporation. Mr. Greene, on behalf of the Corporation, suggested that the payments may have been made by way of compensation to the Corporation for what may have been claimed to be disturbance of the market.

In my judgment, in the absence of any explanation to the contrary, the proper inference to draw is that the Corporation, by imposing and accepting the payments, agreed to treat the particular premises in respect of which the payments were made as included within the market, at any rate so long as the respective agreements to make such payments remained in force. The list 49 F.1 includes an office on the ground floor of Nos. 36 and 37 Steward Street occupied for the sale of fruit, vegetables and other like commodities by one, E. Bevington. The first payment in respect of this office was made in respect of the year 1930. No payment appears to have been made in respect of any other part of Nos. 36 and 37 Steward Street. The inclusion, however, of the part of a building does not I think operate as an inclusion of the whole of that building, and I am unable to find any evidence to support the contention that the Corporation have included in the market area that part of Nos. 36 and 37 Steward Street which is in the occupation of the defendant company; although I am satisfied that, if the Corporation desired to do so, there is nothing to prevent them from agreeing to its inclusion. In the result I hold that that part of Nos. 36 and 37 Steward Street which is in the occupation of the defendant company is not at the present time within Spitalfields Market.

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(1) 7 B. & C. 40, 54.

The matter however does not rest here, for the Corporation claims that the holding of auction sales by the defendant company on the premises which I have held not to be within the market, constitutes the levying of a rival market, or is otherwise a disturbance of its rights as market owner. The question whether a rival market has been levied or not is necessarily a question of fact. Speaking generally, if a person holds auction sales of commodities usually sold within the market within the prescribed distance of the market, and on an authorized market day, he by so doing levies a rival market, see *Dorchester Corporation* v. *Ensor* (1); but different considerations seem to me to apply if there is a right to sell by auction within the market and there is a refusal of all facilities for the exercise of such right, whether on the ground that there is no room within the market or arbitrarily when there is in fact sufficient room within the market. For it is

(1) L. R. 4 Ex. 335.

settled law that the grantee of a market which is not limited by metes and bounds may hold his market anywhere within the prescribed district and in more places than one, and may also change the places where it is held.

It is also settled law that an obligation is cast on the owner of the market to provide convenient accommodation for all who are desirous of buying or selling within the market. If the market owner does not fulfil his obligation, or if after having once appropriated a particular site or sites for use as a market place, he afterwards employs or permits that site or sites or any part or parts of it or them to be used for other purposes, without providing within the limits of the franchise another site or other sites for the public to buy or sell, then, whatever other consequences may ensue, a person selling outside the market is afforded a good defence to any action brought by the market owner to prevent such selling, provided he has been prevented from selling by want of convenient room: see *Prince* v. *Lewis* (1); *Mosley* v. *Walker* (2); *In re the Islington Market Bill.* (3)

It has been decided that any person entitled to sell in a market can sell in whatever manner he may select, whether it be by private treaty or by public auction: see *Hailsham Cattle Market Co.* v. *Tolman* (4), per Sargant J.; *Nicholls* v. *Tavistock Urban District Council.* (5) It has also been decided, that if there is no available room within the market for a person to carry on the business of selling his goods there, it is a good defence to an action for disturbance of the market to plead want of accommodation: see *In re Islington Market Bill.* (3) The same defence must I think necessarily be available if, while there is accommodation within the market, the market owners deny all access to the market for that purpose to a person desirous of selling who makes proper application for the necessary facilities and offers to pay the proper tolls and dues in respect of sales effected. Indeed it is difficult to appreciate how a market owner in such a case can properly ask the court to restrain a person doing outside the market that which he would be entitled to do within the market but for the arbitrary refusal of the market owner. To grant an injunction at the suit of the market owner in such a case would seem to be contrary to the principles on which these courts act.

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(1) 5 B. & C. 363.

(2) 7 B. & C. 40.

(3) 3 Cl. & F. 513.

(4) [1915] 1 Ch. 360, 367.

(5) [1923] 2 Ch. 18.

It was argued on behalf of the Corporation that part of the market has been appropriated to sales of fruit and vegetables by private treaty, and that another part, namely, the London Fruit Exchange, has been appropriated for sales of fruit, vegetables and other like commodities by public auction; and that it was and is necessary for the proper orderly conduct of the market that sales by auction should be held in the auction rooms of the London Fruit Exchange and not elsewhere. The Corporation pleads in its reply that for this reason, the Corporation has not been and is not willing to allow sales by auction within the market or the franchise thereof except in the auction rooms.

Having carefully considered the evidence, I am satisfied that there has been no appropriation of any part of the market for the holding of sales by auction by the public. The London Fruit Exchange it is true contains auction rooms, and sales by auction of fruit, vegetables and like commodities take place there; but no part of the building has been made available for sales by auction by all persons entitled to use the market; indeed from their point of view the London Fruit Exchange has been taken out of the market, because the bulk of it, including the only parts adapted for use as auction rooms with the necessary showrooms and storage, has been let for a term of years to an association whose members can, subject to the terms of their lease, use the premises as they think fit. It is said that there is no space available within the market for sales by auction. I do not think the evidence supports this plea. I am satisfied that there would be no difficulty in holding sales by auction in the market in exactly the same way as such sales were held before the London Fruit Exchange was built; but whether this be so or not, it is I think plain that the Corporation could properly assent to such sales taking place so far as the defendant company is concerned on the premises occupied by them at Nos. 36 and 37 Steward Street, and so far as other persons are concerned in premises which could by consent of the Corporation be included within the market, either under the original charter or at least under one or other of the statutory provisions authorizing the extension of the market. I am satisfied that the refusal of the Corporation to allow the defendant company to sell by auction is not due to any present want of accommodation or to any real apprehension of inconvenience within the market, but to a desire to give effect to the original understanding that the lessees of the London Fruit Exchange should have the sole right of selling by auction within the market. I am not prepared to accept the evidence given by Major Millman with regard to want of accommodation and the likelihood of inconvenience. The Corporation as market owners are entitled to make rules and regulations for the proper conduct of the market. Indeed a statutory power to do so has been conferred on them, to which I have already referred, and the Corporation can properly resort to this power to prevent any inconvenience arising from sales by auction if held in the " main market." If the sales by auction are held in premises occupied by the auctioneers which are by the consent of the Corporation included within the market area, it seems to me no difficulty on this head can arise.

In my judgment, for the reasons given by me, I think the action fails in so far as it seeks to restrain the defendant company from holding sales by auction at their premises in Nos. 36 and 37 Steward Street. A subsidiary question is raised on behalf of the Corporation. The defendant company has stated on its stationery and elsewhere that its address is 36 and 37 Steward Street, Spitalfields Market ; evidence was called to establish the fact that the correct postal address was 36 and 37 Steward Street, E. The Corporation says that the reference to Spitalfields Market as part of the address is an invasion by the defendant company of its rights as market owner and claims an injunction to restrain such user. It is difficult to understand the precise ground on which the relief is sought. The user cannot cause the smallest damage, and I see no ground on which such an injunction should be granted. The Corporation is entitled to a declaration that that part of 36 and 37 Steward Street, now occupied by the defendant company, is not within the market, but this declaration must necessarily be without prejudice to the right of the Corporation at any subsequent date to include the premises in the market.

The defendant company has by its counterclaim asked for (1.) a declaration that it is entitled to sell by auction within the market, fruit, vegetables and other like commodities upon payment of the reasonable and customary tolls of the market, and (2.) a declaration that 36 and 37 Steward Street form part of and are within the said market. I have already stated that in my judgment any member of the public is entitled at common law to sell by auction the appropriate commodities within Spitalfields Market, but this right is necessarily subject to certain limitations. For instance the Corporation has power to make by-laws regulating the conduct of the market and can enforce obedience to such by-laws so long as they are valid and do not seek to prohibit sales by auction entirely. Further the right to sell by auction in the market is one which is common to every member of the public and can only be enforced by a particular member of the public so long as there is room in the market for its exercise by him. A member of the public cannot by declaration or injunction obtain any right of priority over other members of the public, and this must be borne in mind in framing the appropriate declaration.

In the result I think there should be a declaration that the defendant company is entitled, in common with all other persons, firms and companies desiring to sell fruit, vegetables and other like commodities within Spitalfields Market, to conduct sales by auction within the market upon payment of the customary tolls and subject to such by-laws as may from time to time be made by the Corporation for the conduct of the market; but this declaration is without prejudice to the rights conferred by the Corporation on their lessees and

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on the respective tenants of stalls, warehouses and other premises within the limits of the said market.

So far as the second declaration is concerned, I have already held that such part of Nos. 36 and 37 Steward Street as is occupied by the defendant company is not within the said market, and consequently there is no ground on which such declaration can be made.

So far as the costs of the action and counterclaim are concerned, I think the proper order to make is to give the Corporation the costs of the action and counterclaim so far as they respectively relate to the issue whether the part of 36 and 37 Steward Street occupied by the defendant company is within Spitalfields Market, and to give to the defendant company the costs of the action and counterclaim so far as they respectively relate to the other issues. There will be the usual set-off and liberty to apply.

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C. A.

The Corporation appealed. The point that the defendants' premises were within the market was not raised in the Court of Appeal. The appeal was heard on May 31, June 4, 5 and 6, 1935, and judgment was delivered on July 17, 1935.

Wilfrid Greene K.C., *Gavin Simonds* K.C., and *Wilfrid Hunt* for the appellants. The defendants are carrying on a rival market, and this they are not entitled to do: *In re Islington Market Bill.* (1) That case shows that even if it could properly be said that the Corporation had failed in their duty as market owners by failing to provide space within the market for the defendants to carry on their sales by auction on payment of tolls, that would not entitle them to levy a rival market. The Crown itself could not allow such an Act: see also *Goldsmid* v. *Great Eastern Ry. Co.* (2), a case connected with Spitalfields Market when the carrying on of a rival market was restrained. It is true that a market owner is under an obligation, while there is room, to provide accommodation to traders for the sale of marketable commodities on payment of tolls, but that is only for the purpose of selling their own goods by private treaty. There is no common law right to go into the market for the purpose of carrying on sales by auction. *Nicholls* v. *Tavistock Urban District Council* (1) does not really decide otherwise. But as already pointed out, the defendants could not justify themselves in levying a rival market even if the market owners' default were established. It was argued in the Court below that, as the market was not limited by metes and bounds (*Attorney-General* v. *Horner* (2)), the Corporation ought to have extended the market to the defendants' premises, if there was no room for them within the market. The market which was acquired by the Corporation under the City of London Spitalfields Market Act, 1902, s. 5, has since been the subject of the following Acts: the City of London (Various Powers) Act, 1914, the City of London (Various Powers) Act, 1920, and the City of London (Various Powers) Act, 1922. The Corporation had thereunder no power to extend the market to the defendants' premises. That what the defendants are doing amounts to the levying of a market is made clear by the following cases: *Dorchester Corporation* v. *Ensor* (3); *Elwes* v. *Payne* (4); *Wilcox* v. *Steel* (5); *Morpeth Corporation* v. *Northumberland Farmers' Auction Mart Co.* (6); and *Lord Midleton* v. *Power*. (7) The market owner has a clear right to protection of his market rights against a rival market by injunction.

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(1) 3 Cl. & F. 513.

(2) 25 Ch. D. 511; 9 App. Cas. 927.

[ROMER L.J. That would be no hardship when auction sales could be carried on within the market.]

It is immaterial that the sales cannot be held inside the market. There is no objection to a man selling his own goods in his own shop, but he can be stopped from taking advantage of the concourse of persons attracted to the market. As to what amounts to a disturbance of the market by levying a rival market or by other acts: see Pease and Chitty

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(1) [1923] 2 Ch. 18.
(2) 11 App. Cas. 66.
(3) L. R. 4 Ex. 335.
(4) 12 Ch. D. 468.
(5) [1904] 1 Ch. 212.
(6) [1921] 2 Ch. 154.
(7) 19 L. R. Ir. 1.

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on Markets and Fairs (1899 ed.), p. 74. It is on the ground of disturbance that the franchise owner can stop the levying of a rival market, and this he can do under the common law at any place within six and two-third miles of the market: *Hailsham Market* case. (1)

To sum up, the appellants' contentions are as follows: First, the market owner is entitled by virtue of his franchise to restrain the levying of a rival market. Secondly, the lack of accommodation in the market is no defence to the market owner's claim, whether such lack arises (*a*) from the market being full, or (*b*) from part of the market area having been improperly devoted by the market owner to purposes other than market purposes, or (*c*) from any other breach of duty by the market owner. In none of these cases is the disturbance of the market by setting up a rival market justified. All that can be done in these cases is, if the market is full, to obtain from the Crown another franchise or, if the market owner is guilty of misconduct, to obtain from the Crown the revocation of the market owner's franchise. The Crown itself could not on the ground of the market owner's misconduct grant a new charter without first revoking the old one: see *In re Islington Market Bill.* (2) Thirdly, the holding of an auction amounts to the levying of a rival market if it affords facilities for numerous sellers to sell goods to numerous buyers. That is the position in the present case.

As regards the counterclaim by which the defendants sought a declaration that they were entitled to sell by auction within the market. This claim is really academic, as the defendants' premises have been held to be outside the market. Further there is no right at common law for an individual to carry on such a business within the market, and here the market owners had no power to embody the defendants' premises in the market.

[They also referred to the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14).

Linton Thorp K.C., *H. Heathcote-Williams*, and *L. A. Blundell* for the respondents. The defendants are not carrying on a rival market, for they are selling only to wholesale dealers. Further the plaintiffs are not entitled to protection by injunction from the defendants' disturbance of the market in view of their illegal act in refusing accommodation to the defendants within the market. That refusal is due to the fact that they have in letting the London Fruit Exchange undertaken to give the lessees the monopoly of selling fruit by auction within the market. Moreover a market owner is only entitled to let off part of the market, as in the case of the London Fruit Exchange, if there remains sufficient accommodation within the market. If therefore it be sought to base the Corporation's refusal to give the defendants accommodation within the market on lack of room, the answer is that the erection and letting off of the London Fruit Exchange was improper.

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(1) [1915] 1 Ch. 360.

(2) 3 Cl. & F. 513, 519.

[ROMER L.J. Would this justify the defendants in levying a rival market ?]

No, but it would be an answer to an action for disturbance of the market not amounting to the carrying on of a rival market : *Mosley* v. *Walker*. (1) To support this action the Corporation must establish that the defendants are not merely disturbing the market but carrying on a rival market. There is no ground for saying that the Corporation could not obtain land for an extension of the market or include the defendants' premises within the market area. The defendants are willing and have offered to pay tolls. The Corporation are in truth disregarding their common law obligation to provide room in the market : see *Attorney-General* v. *Horner* (2) and *Prince* v. *Lewis*. (3) There would be plenty of room in the market if the whole market area was devoted to the market needs, as it ought to be.

[LORD HANWORTH M.R. *Great Eastern Ry. Co.* v. *Goldsmid* (4) establishes that there is no right to carry on a rival market even though the market owner has misapplied part of the market space.]

The defendants' case is that they are not carrying on a rival market. The plaintiffs cannot under pretence of regulating the market deprive the public of its use for a particular purpose: *Municipal Corporation of City of Toronto* v. *Virgo.* (1) It is fallacious to say that the plaintiffs could pass by-laws prohibiting sales by auction in the market: *Nicholls* v. *Tavistock Urban District Council.* (2) The defendants are tenants of 36 and 37 Steward Street, and in selling there they are selling in their own shop, as they are entitled to do. The fact that they are holding sales by auction there is not enough to make them guilty of carrying on a rival market: see *Macclesfield Corporation* v. *Pedley* (3); *Penrhyn Corporation* v. *Best* (4); *Wiltshire* v. *Willett* (5); and *Haynes* v. *Ford.* (6)

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(1) 7 B. & C. 40, 55.
(2) 14 Q. B. D. 245, 254, 264.
(3) 5 B. & C. 363.
(4) 9 App. Cas. 927.

On the facts the defendants are not carrying on a rival market. In order to do so they must bring about a concourse of buyers and sellers: *Goldsmid* v. *Great Eastern Ry. Co.* (7) The defendants are not asking persons all over the country to send goods for sale. All the goods sold by auction are sold for J. Lyons except in the case of oranges. The only advertisements are those inviting buyers, and the sales were only to wholesale buyers. There was therefore no concourse of sellers. It is a question of fact whether a rival market is being carried on. In the cases relied on by the appellants, namely, *Dorchester Corporation* v. *Ensor* (8); *Elwes* v. *Payne* (9); and *Morpeth Corporation* v. *Northumberland Farmers' Auction Mart Co.* (10), the facts were entirely different in character from those in the present case. Here the learned judge held that the defendants were not carrying on a rival market, and there is no reason why the Court of Appeal should take a different view on facts which are not now in dispute.

As regards the declaratory order made by Luxmoore J. on the counterclaim, such an order is sanctioned by Order XXV., r. 5: see *Hanson* v. *Radcliffe Urban District Council.* (11)

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(1) [1896] A. C. 88.
(2) [1923] 2 Ch. 18.
(3) 4 B. & Ad. 397, 403.
(4) 3 Ex. D. 292, 297.
(5) 11 C. B. (N. S.) 240.
(6) [1911] 2 Ch. 237, 251.
(7) 25 Ch. D. 511, 540; 9 App. Cas. 927.
(8) L. R. 4 Ex. 335, 341.
(9) 12 Ch. D. 468, 471.
(10) [1921] 2 Ch. 154.
(11) [1922] 2 Ch. 490.

It is a direct issue between the parties when sales by auction ought to be allowed in the market, and the declaration was therefore properly made: *London & North Eastern Ry. Co.* v. *British Trawlers Federation, Ld.* (1); *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee.* (2)

Wilfrid Greene K.C. in reply. It is now conceded that if the defendants are levying a rival market they cannot justify it on the ground of the Corporation's refusal of accommodation. Luxmoore J. did not find that the defendants were not levying a rival market, and so to hold would be against the weight of the evidence. The defendants are providing facilities for selling goods as agents for Mr. Lyons or as sub-agents through Mr. Lyons of many other consignees. They are therefore providing facilities for the sale of goods belonging to a number of persons, and accordingly are levying a rival market: *Dorchester Corporation* v. *Ensor* (3), and see also *Wilcox* v. *Steel.* (4) The cases relied on by the defendants as justifying sales by auction in a shop all arose under private Acts or under the Markets and Fairs Clauses Act, 1847, s. 13, which permitted selling by auction on commission in the auctioneer's own shop. The Corporation have statutory power to buy lands for purposes connected with the market, and the banks, public-houses, etc., within the market area could therefore be properly allowed. There is no ground for saying that the London Fruit Exchange has been taken out of the market. The fact that the defendants' sales are made to wholesale dealers is not a ground for saying that the defendants are not levying a market: *Scott* v. *Glasgow Corporation.* (5)

Cur. adv. vult.

July 17. LORD HANWORTH M.R. This action was brought by the plaintiffs to secure protection to them in the maintenance of their rights and privileges as owners of Spitalfields Market.

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(1) [1934] A. C. 279, 298.
(2) [1892] 3 Ch. 242.
(3) L. R. 4 Ex. 335, 342.
(4) [1904] 1 Ch. 212.
(5) [1899] A. C. 470.

The charge against the defendants is that they have held at Nos. 36 and 37 Steward Street, a street on the west side of the market, auctions of fruit, vegetables and produce similar to those sold in the market and have thereby (*a*) levied a rival market, or (*b*) caused a disturbance of the rights and privileges of the plaintiffs in the maintenance of their market.

The defendant company admits that it has held sales by auction of fruit, vegetables and other produce similar to those sold in the market at 36 and 37 Steward Street, and that it intends to continue this business. It contends that the premises on which these auctions are conducted are within Spitalfields Market, and thus that it is entitled to do what others do, or have done, in the market; or, alternatively, if the said premises are not within the market, it is justified in its actions, because the Corporation has refused to allow it the necessary facilities for selling by auction within the market.

The defendant company denies that it has levied a rival market, or has caused a disturbance of the rights and privileges of the plaintiffs. The company counterclaims for a declaration that it is entitled to sell its goods by auction within the market upon payment of the reasonable and customary tolls.

The learned judge upon the material before him held that the part of 36 and 37 Steward Street which is occupied and used by the defendant company, is not within the Spitalfields Market, and from this conclusion there is no appeal. He also made a declaration that the defendant company are entitled in common with all other persons, firms, and companies desiring to sell fruit, vegetables, and the like within Spitalfields Market, to conduct sales by auction within the market upon payment of the customary tolls and subject to any such by-laws as may from time to time be made by the plaintiffs.

There was little dispute upon the facts of the case and the learned judge stated them so fully, and deduced the plaintiffs' title so carefully, that it is unnecessary to go over the same ground again; but the judgment as drawn up did not embody the conclusions reached by the judge or express his determination upon the points involved. The learned judge recalled the principle that the question whether a rival market has been levied, or not, is necessarily a question of fact, and he stated his several conclusions that are relevant to the issues raised. It will, therefore, be useful to restate the findings of the learned judge before considering the points to be decided upon the appeal.

The history of the market, for practical purposes, may be said to begin with the grant of the right to hold the market now known as Spitalfields Market by King Charles II. by letters patent dated July 29, 1682, to Balch and his heirs and assigns. That grant has been established as valid by the decision of the House of Lords in the case of the *Great Eastern Ry. Co.* v. *Goldsmid.* (1) The rights thus granted are now vested in the plaintiffs by the steps recounted by the learned judge. The market is now held on all days of the week, and upon an area of which the origin is explained and deduced in the judgment, but which does not include 36 and 37 Steward Street.

The main market, which the judge interprets to mean the original market, and the western extension of it, comprises 68 shops or warehouses let to 50 different tenants and 188 stands let to 114 different tenants. He finds that "apart from the stands there is no space in the main market, or in the streets or buildings surrounding it, upon which members of the public desiring to sell fruit, vegetables or other commodities can expose their wares for sale." He states that the evidence satisfied him that auction sales both in the original market, and after the western extension was completed, in the main market, were held at least from 1897 onwards till the Great War, and were re-started again when the Corporation had acquired control of the market, that is, on June 7, 1920. The earlier auction sales took place during the period when Robert Horner was conducting the market in that part of the original market which was occupied by stands, and were held once or twice a week

(1) 9 App. Cas. 927.

between the month of September and the following April. They were held in spaces allotted for the purpose by Horner, and at times when the business in the market was slack, generally at about 2 o'clock in the afternoon.

Then comes an important finding of fact: "There was no difficulty in obtaining facilities for holding an auction and no inconvenience was apparently caused to any one by the holding of these auctions. After the Corporation took over the conduct of the market the same practice was followed. A trader desirous of holding an auction advertised the fact, and on the morning on which the auction was to be held, the superintendent of the market allotted a space for it. Shortly before the auction took place, a bell was rung by an official of the Corporation to warn the persons in the market that the auction was about to take place. I am satisfied that no inconvenience was caused by any of these auctions."

The learned judge expressly says that he preferred the evidence given by the witnesses who were called by the defendant company on the question whether the auctions had become objectionable. After 1924 the auction sales were held in several different premises belonging to the Corporation outside the main market, and caused no inconvenience to any one engaged in selling their goods in the original or in the main market. The judge states that the last sale by auction before the opening of the London Fruit Exchange took place on July 30, 1929. After that date the Corporation has declined to allow any facilities for sales by auction to any person, company, or firm, other than those constituting, or interested in, the London Fruit Exchange Brokers' Association, Ld.

The learned judge finds upon the evidence that there would be no difficulty in holding sales by auction in the market in exactly the same way as such sales were held before the London Fruit Exchange was built; and also that the Corporation could properly assent to such sales taking place, so far as the defendant company is concerned, on the premises 36, 37 Steward Street. "I am satisfied that the refusal of the Corporation to allow the defendant company to sell by auction is not due to any present want of accommodation or to any real apprehension of inconvenience within the market, but to a desire to give effect to the original understanding that the lessees of the London Fruit Exchange should have the sole right of selling by auction within the market." He rejects Major Millman's evidence as to want of accommodation and the likelihood of inconvenience.

These findings of fact appear to be of primary importance. They were reached after a trial which was heard on ten days in March and April last year, and the learned judge gave his judgment after deliberation on November 30, 1934.

They appear to me to connote this—namely, that : (*a*) The circumstances under which the auctions conducted by the defendant company were held must be examined in order to determine whether their purpose was to assert a right independent of, and as a challenge to, the plaintiffs' rights. (*b*) The holding of an auction on premises outside the main market ought not, under the circumstances of the case, per se to be treated as the levying of a rival market. (*c*) The assent of the Corporation could have been given to the auction sales conducted by the defendant company on their premises at 36 and 37 Steward Street. (*d*) Such consent was withheld, not because of the likelihood of any inconvenience being caused, but for an ulterior motive—namely, in order to give effect to the original understanding that the lessees of the London Fruit Exchange should be protected in an exclusive right of selling by auction within the market. That understanding was expressed in the letter, dated June 20, 1930, addressed to the secretary of the London Fruit Exchange Brokers' Association as follows : "The Corporation will be vigilant to see that their market rights as owners of Spitalfields Market or otherwise are not infringed, and it is obvious that the special position of your association as lessees under the proposed lease will then be substantially safeguarded." (*e*) Consequently the action of the defendant company in selling by auction at 36, 37 Steward Street, was not to be attributed to setting up a rival market

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against, or as a challenge, to the plaintiffs' rights of market. The defendant company are ready and willing to pay the reasonable customary market tolls. It is admitted that the company tendered certain tolls which were refused by the plaintiffs. The defendant company have paid into Court a sum to represent the tolls due from them. (*f*) Following the case of the *Islington Market Bill* (1), a good defence to an action for setting up a rival market, or for disturbance of a market, may be founded upon a plea of want of accommodation. (*g*) The action of the defendant company in selling by auction where they do, was to be attributed to the refusal of the plaintiffs to afford them accommodation within the market, as they could do if so minded. That accommodation would enable the defendant company to carry on auction sales in the manner usual down to July 30, 1929, but it was now refused; not for any reason directly arising from the want of space in the market, but for the reasons, and with the purpose, already referred to. (*h*) This conduct of the plaintiffs was not adopted by the plaintiffs in the exercise of their consideration for the public attending the market, whether as vendors or purchasers.

In my judgment there was abundant evidence upon which the judge could come to these conclusions of fact, and the inferences which he drew from them were also justified. It seems, therefore, that the question of law which remains for decision is whether the defendant company, when it was refused facilities for holding its auctions within the market, was justified in taking the course it did in holding auctions upon premises outside the market, or whether this conduct must be taken to amount to a disturbance of the market rights of the plaintiffs.

Prince v. *Lewis* (2) was decided in 1826. It was held that the lord of the market could not maintain an action against an individual for selling vegetables in the neighbourhood of his market, where the space reserved for the market had been diminished by being appropriated to purposes other than those specified in the grant, and the remaining part of

(1) 3 Cl. & F. 513, 518, 519.

(2) 5 B. & C. 363.

the market had become insufficient for the accommodation of the public. As Bayley J. said (1): "Wherever there is the franchise of a market, the lord has certain rights, but he has also certain duties to perform towards the public in respect of those rights. One of those duties towards the public is, that the lord shall, as far as the limits of the market will allow of, take care that there is sufficient room for all the purposes of the market."

In *Mosley* v. *Walker* (2), where a man had a stall in the market which he might have occupied, but sold goods in a house adjoining the market, it was held that from the state of the market place the defendant had a reasonable cause for selling in the private house and not in the market. "It is always a question of fact whether there has been in the particular instance such an exclusion or not, and such an appropriation of a particular place": see Bayley J. (3) So far then as it is a question of fact, the learned judge has in his findings or conclusions, (*d*), (*e*) and (*g*), held in favour of the defendant company.

Prince v. *Lewis* (4) and *Mosley* v. *Walker* (2) were cited with approval by the learned judges in giving their answer to questions propounded to them by the House of Lords in the *Islington Market Bill* case. (5) Littledale J., giving the judges' unanimous opinion, stated the law as follows (6): "An obligation is cast upon him [the grantee] by his acceptance of the grant, to provide convenient accommodation for all who are ready to buy and sell in the public market. If he does not do so, or if, after having once appropriated a particular site for the use of the public as a market place, he afterwards employs or permits it, or part of it, to be employed for other purposes without providing as convenient a place for the public to buy and sell in elsewhere, within the limits of his grant, the consequence would be first, that there would be a good defence to an action brought by the grantee of the franchise against any person for selling out of the market to the prejudice of his right, provided such person had been prevented from selling in the market by the want of convenient room."

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(1) 5 B. & C. 371.
(2) 7 B. & C. 40.
(3) Ibid. 54.
(4) 5 B. & C. 363.
(5) 3 Cl. & F. 513.
(6) Ibid. 518.

The principle contained in the passages cited is clear. There is a duty of the grantee of a market franchise towards members of the public who desire access to the market for the legitimate purpose of selling within it. The grantee must not neglect this duty and attempt to justify his neglect by saying there is no sufficient space within the market for the applicant to have facilities for selling within it, and upon this point the grantee cannot rely upon the allocation of some of the space to other purposes than those which are appropriate to the proper user of the franchise.

The grantee cannot charge a defendant with setting up a rival market or disturbing his market, when the action of the defendant is due to his own arbitrary conduct without due consideration of his duty to a member of the public.

Some passages in the speech of Lord Blackburn in the case of the *Great Eastern Ry. Co.* v. *Goldsmid* (1) were cited by Mr. Greene in support of his argument, in which no doubt that learned Lord emphasized the principle, that a person who holds the franchise of a market can maintain an action against one who sets up a rival market, or disturbs his market, so as to injure him, and whether it did so or not was a matter of evidence: "The question whether it did actually injure him or not being a matter of fact." (2) It is true that it is not necessary for the owner of the franchise, who seeks protection, to prove actual damage: see *Dorchester Corporation* v. *Ensor* (3); *Yard* v. *Ford* (4); *Morpeth Corporation* v. *Northumberland Farmers' Auction Mart Co.* (5) Lord Blackburn also points out (6) that in an action by the lord to obtain protection for his market an averment that the plaintiff has provided sufficient stalls in the market is not necessary; or that he had kept the market open in such a way that persons might enter into it: and Lord Selborne said that

(1) 9 App. Cas. 927.
(2) Ibid. 958.
(3) L. R. 4 Ex. 335, 343.
(4) (1670) 2 Wm. Saund. 172.
(5) [1921] 2 Ch. 154.
(6) 9 App. Cas. 960.

mere insufficiency of accommodation, although it might affect the quantum of damages, "yet that cannot possibly be an answer justifying an infringement of the market right."

But upon the point that I am dealing with, whether a defendant who has been arbitrarily refused facilities in the market can justify selling outside it, Lord Blackburn says (1): "If you read carefully what Littledale J., giving the opinion of himself and Parke B., says, it is impossible not to perceive that they did not consider that in *Prince* v. *Lewis* (2) the fact that the plaintiff did not maintain the market in good and sufficient order was a bar to an action such as this for disturbing the market, or even to an action against an individual for disturbance; but only that if it was the fact that it did prevent a person from using the market, that might disprove the allegation that he had disturbed the market by selling as he did, inasmuch as he could not have sold in the market but was prevented from doing so. That is what they pointedly say, and that I think no one would quarrel with."

But then it is argued that although a trader may claim facilities for selling his goods within a market, it is quite otherwise when the claim is made by an auctioneer to carry on the business of auctioneering within the market such goods as all and sundry may place in his hands to sell by auction, and of which he is not the grower or the owner. This objection needs consideration. It is not concluded by the previous practice that obtained down to July, 1930.

It must be recognized that business is carried on in a market in ways manifoldly different from the days of Edward III., when the market originated, or in the days of Charles II., when the grant was made to Balch. The quantum of produce to be dealt with has reached proportions unknown in simpler days.

Sir George Jessel M.R. in *Elwes* v. *Payne* (3) states his opinion in clear terms that selling cattle by auction amounts in certain circumstances to establishing a rival market.

(1) 9 App. Cas. 961.

(2) 5 B. & C. 363.

(3) 12 Ch. D. 468, 473.

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"I do not think that any possible definition of the word 'market' would exclude what the defendants are doing. They are inviting the public to send their cattle, their horses, and their sheep, and other animals for sale to this place which they have built as a place of sale for cattle and horses. They invite people to come in and buy the cattle. It makes no difference, in my opinion, whether there is a sole seller, or a sole stall-keeper. In fact, in many ancient markets you could only sell before the clerk of the market or other officer of that kind. It was necessary to do that in order to make a valid sale at all, and therefore the mere fact that all the sales are to take place before one individual does not appear to me to make any difference." These observations of the learned Master of the Rolls arose from considering the activities of an auctioneer from a point of view different from that which is under discussion; but they clearly indicate that in his view auctioneering was what may be called a market operation, and not a method of dealing in goods which is alien to the carrying on of a market.

It is an insufficient statement of the position and duties of an auctioneer to say that he is a mere seller of goods not his own, for other owners of them. He has a possession coupled with an interest in goods which he is employed to sell, not a bare custody like a servant or shopman: see per Lord Loughborough in *Williams* v. *Millington*. (1) He has a special property with a lien for the charges of the sale, the commission, and the auction duty which he is bound to pay. He must receive payment. If he gives credit to the purchaser it is at his own risk. He may maintain an action for goods sold and delivered against a buyer, and he can maintain trespass or trover against persons wrongfully interfering with or converting the goods (1), and see *Consolidated Co.* v. *Curtis & Son*. (2) He has power also to sign a sufficient memorandum under the Sale of Goods Act, 1893, s. 4: see *McManus* v. *Fortescue*. (3)

A consideration of these features and duties of an

(1) (1788) 1 H. Bl. 81, 84.
(2) [1892] 1 Q. B. 495.
(3) [1907] 2 K. B. 1, 4.

auctioneer's work leads me to the conclusion that he can rightly claim to be admitted to a market to exercise his calling as much as the growers and owners who enter it to sell their own goods to purchasers attending it.

In *Nicholls* v. *Tavistock Urban District Council* (1) my brother Romer, sitting as a judge of first instance, held that a person who was by the common law entitled to access to a market for the purpose of selling his goods by auction without any restriction whatever being placed upon his user of it, was not liable to have this right curtailed even though the restriction imposed by the by-law was only to require the consent of a superintendent officer to the manner in which, and persons by whom, the auction should be conducted. One of the plaintiffs in that action was an auctioneer who was to sell the cattle of, and for, the other plaintiff.

Romer J. held the by-law invalid as repugnant to the laws of that part of the land in which the market was situated, and he decided that the defendant council were not entitled to prevent the one plaintiff, who was the farmer and owner, or the other plaintiff, the auctioneer, from selling their cattle in the market by public auction, or to impose the limitations intended by the by-law. In my judgment this decision was right. It goes far to establish that an auctioneer as such has the right of access to and user of a market, and from this case and the other considerations that I have also advanced, I think that no objection or exception is to be taken against the defendants who are and intend to act as auctioneers, and have been excluded from the market, not from direct, but from ulterior motives by the plaintiffs.

For these reasons I am of opinion that the judgment of Luxmoore J. was right and that the appeal should be dismissed with costs.

ROMER L.J. This appeal raises a question of market law that is one both of novelty and difficulty. It can, as I see it, be stated in the following way. Every member of the public has a right of access to Spitalfields Market for the

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(1) [1923] 2 Ch. 18.

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purpose of selling such goods as are commonly dealt with there. The market is not one limited by metes and bounds, and the plaintiffs as the owners of the market are under an obligation to provide accommodation to the public for that purpose. Should they fail to do so, any member of the public who, by reason of such failure, is prevented from selling his goods in the market is entitled to sell them outside the market in circumstances that would constitute a disturbance of the plaintiffs' franchise rights in the market and that, but for such failure, would give the plaintiffs a right of action against him. The plaintiffs' failure to provide adequate accommodation in the market would, in other words, be a good defence to any action instituted by them for such disturbance. All this is settled law. See *Prince* v. *Lewis* (1); *Mosley* v. *Walker* (2); and the *Islington Market Bill* case. (3)

At the time when these propositions of law were first established it is probable that the ordinary method of sale was by private treaty, and that sales by public auction were rare, even if they were not unknown. But the owner of goods who desires to sell them in a market must be entitled to sell them in any way that, having regard to the changing habits of the times, may prove to be the most effective and convenient way, and the propositions of law would seem to be as applicable to sales by auction as to sales by private treaty. I so held in the case of *Nicholls* v. *Tavistock Urban District Council* (4), and I see no reason for altering the opinion that I expressed in that case.

The question to be determined on this appeal is, however, a somewhat different one. It is the question whether those propositions of law apply to a person who desires to sell not his own goods, but goods of others entrusted to him for that purpose.

In the *Tavistock* case (4), to which I have just referred, the right of an auctioneer to sell by auction in a market goods entrusted to him by others for sale in that manner was upheld by me. There were two plaintiffs in the action, one

(1) 5 B. & C. 363.
(2) 7 B. & C. 40.
(3) 3 Cl. & F. 513.
(4) [1923] 2 Ch. 18.

of them was a farmer and the other an auctioneer. The farmer sought to establish the right of having his cattle sold in the market by the auctioneer, and the auctioneer sought to establish his right to sell cattle by auction on behalf of his co-plaintiff or any other person who might think fit to employ him for that purpose. The owners of the market denied that either the farmer or the auctioneer had any such right, relying upon a by-law made by their predecessor in title, which purported to prohibit sales by auction by any person whoever he might be without the consent therein mentioned. The defendants did not contend that even in the absence of the by-law sales by auction were illegal. The only question, therefore, that I had to decide was whether this by-law was valid. The defendants do not appear to have suggested that in this respect the case of the auctioneers differed in any way from that of the farmer. Nor, indeed, was it material to do so. For the by-law was indivisible, and if it was bad as regards the farmer, it was bad altogether. But in the course of my judgment I appear to have said this (1): " I have, therefore, to consider whether that by-law is valid or invalid. If it be invalid then, as I understand the law, the plaintiff and Mr. Callaway can attend at the cattle market and other parts of the market at which cattle may be sold and dispose of cattle by auction except in those parts of the cattle market which may have been validly leased for the purposes of sales by auction to the auctioneer-lessees exclusively."

If this be right, and further reflection has not made me think that it is not, the defendants have a right of access to Spitalfields Market for the purpose of selling by auction marketable goods entrusted to them for sale, and the plaintiffs are under an obligation to provide them with accommodation necessary to enable the sales to take place. As was said by Lord Loughborough in the case of *Williams* v. *Millington* (2), to which the Master of the Rolls has referred, an auctioneer has a special property in the goods entrusted to him for sale, and in respect of that property I see no reason why he should

(1) [1923] 2 Ch. 25.

(2) 1 H. Bl. 81, 84.

not have as good a right to use the market as is possessed by the owner of the goods. But the question still remains to be decided whether the refusal by the plaintiffs to provide such accommodation justifies the defendant company in conducting such sales outside the market.

The considerations relevant to the decision of this question are as follows. In the *Islington Market Bill* case (1) Littledale J., in delivering the opinion of the judges, called in to advise the House of Lords on the second occasion, enumerated the consequences that ensue upon the failure of the owner of a franchise market to fulfil his duty of providing convenient accommodation for those entitled to use it. One consequence is that there would be a good defence to an action brought by the owner against any person for selling out of the market to the prejudice of his rights. A second consequence is that the breach of duty, if persisted in, might furnish a ground for a scire facias to repeal the patent by which the market was granted. Thirdly, it is possible that the breach of duty might render the owner liable to an indictment. But these, said the learned judge, are the only consequences of the breach of duty. It cannot operate in point of law as a ground for granting a new charter to another to hold a market within the common law distance. If the breach of duty does not enable the Crown to grant such a charter, a fortiori it will not enable a member of the public to act as though such a charter had been granted to him. It may be observed that the plaintiffs in this respect are also protected by the Charter of Edward III., which has statutory effect. In these circumstances the question to be determined is whether the defendants in the present case can properly be said to be levying a rival market. As to this the plaintiffs place reliance upon certain authorities that must be considered.

In *Dorchester Corporation* v. *Ensor* (2) the plaintiffs as owners of an ancient market complained that the defendant Ensor was creating a disturbance of the market by conducting sales by auction of marketable chattels in a field adjoining

(1) 3 Cl. & F. 513.

(2) L. R. 4 Ex. 335.

a market. In giving judgment Channell B. said this (1): "Now the evidence shewed that the defendant Ensor was an auctioneer, who at one time sold cattle by auction, under the authority of the corporation, at their market, but that latterly he had held, at another place close by, a fortnightly sale of cattle by auction, which appeared to have been regularly advertised. There can be no question that this is substantially another market, and that it differs very much from the case of a man selling his own goods out of the market, which may or may not be a wrongful disturbance, according to the circumstances. The cases, therefore, as to the right of persons in some boroughs, where there is an ancient market to sell marketable goods on their own premises and the like, do not, we think, apply; because what is complained of is, not that the defendants sell their own goods, but that they provide a means for others to sell their goods without bringing them to the market."

Much to the same effect are the observations made by Sir George Jessel M.R. in *Elwes* v. *Payne*. (2)

In neither of these cases, however, did the Court have to determine whether the defendant could justify his acts on the ground that the owner of the market had failed in his duty of providing adequate accommodation. In both cases the question was whether the defendant's acts constituted a disturbance of the plaintiffs' market, and the description of those acts as being, or being substantially, the levying of a rival market may well have been used for the purpose of emphasizing how widely those acts differed from ordinary sales of marketable goods at a shop outside the market, sales which do not as a rule amount to a disturbance of the market. It may well be that in both cases the defendant was in fact behaving, or threatening to behave, as though he possessed a franchise of market, but I cannot regard the cases as authorities for the proposition that every auctioneer selling goods by auction is necessarily so behaving. In the case of *Wilcox* v. *Steel* (3) the acts of the defendant were also described

(1) L. R. 4 Ex. 341.

(2) 12 Ch. D. 468.

(3) [1904] 1 Ch. 212.

both by Vaughan Williams L.J. and Romer L.J. as the setting up of a rival market. But the defendant had done no more than sell by auction in a place adjoining the plaintiff's market a number of cobs, ponies and colts consigned to him by a Welsh breeder of such animals. He had indeed caused a disturbance of the plaintiff's market by acts that differed widely from an isolated sale in a shop—as was pointed out by Romer L.J.; but those acts bore little resemblance to the acts of a man who possesses a charter market, and, as I read the *Islington Market Bill* case (1), it is only acts of that character that cannot be justified by a breach of duty on the part of the market owner.

It may not always be easy to say in any particular case whether a person is committing acts of that character, but in my judgment the defendants in the present case are not doing so. They sell by auction fruit entrusted to them for that purpose by two persons only. They do not seek to attract to their auction rooms fruit sellers in general. There is no concourse of sellers in their auction rooms. The notices of their sales expressly state that buyers only will be admitted, and that goods are being offered to wholesale buyers only. " A market," said Chatterton V.-C. in *Downshire* (*Marquis*) v. *O'Brien* (2), " is, properly speaking, the franchise right of having a concourse of buyers and sellers to dispose of commodities in respect of which the franchise is given." It is admitted that the defendants are willing to pay to the plaintiffs tolls in respect of the goods they sell, and I cannot think that what they are doing can truly be said to resemble the acts of an owner of a franchise market. This was the conclusion at which Luxmoore J. arrived, after hearing the evidence, and in my opinion his conclusion was right.

The appeal in my judgment fails and must be dismissed.

MAUGHAM L.J. By this appeal on behalf of the Mayor and Commonalty and Citizens of the City of London, plaintiffs in the action, an injunction is sought perpetually to restrain the defendants, who are fruit brokers, from holding sales by

(1) 3 Cl. & F. 513.

(2) (1887) 19 L. R. Ir. 380, 390.

auction of fruit, vegetables, or other like commodities in or upon their premises Nos. 36 and 37 Steward Street in the City of London, and from establishing or carrying on any market for fruit or vegetables upon the said premises and from using, or permitting to be used, such premises or any other premises in such manner as to disturb or interfere with or prejudicially affect any of the rights or privileges of the plaintiffs in or in respect of the market known as Spitalfields Market. This is the main subject of the appeal, but the appellants also sought to have discharged a declaration made by the learned judge upon the counterclaim that the defendants, in common with all other persons, firms and companies desiring to sell fruit, vegetables, and other like commodities within Spitalfields Market, are entitled to conduct sales by auction within the market upon payment of the customary tolls and subject to any such by-laws as may from time to time be made by the plaintiffs for the conduct of the market. The declaration was made without prejudice to the rights conferred by the plaintiffs on their lessees and on the respective tenants of stalls, warehouses and other premises within the limits of the market. Having regard to the careful and accurate statement of the title and the facts by Luxmoore J., and to the summary of the facts by the Master of the Rolls, which I have had the advantage of reading, it does not seem to me necessary to do more than state some of the basic facts on which the fate of the appeal must depend. I will content myself with saying that the right to hold the market known as Spitalfields Market was granted by King Charles II., by letters patent dated July 29, 1682, to one Balch, his heirs and assigns. The validity of the grant was finally established by a decision of the House of Lords in *Great Eastern Ry. Co.* v. *Goldsmid.* (1) The franchise included the right to keep two general markets in every week, the first on Thursday and the other on Saturday, in or near (in sive juxta) a certain place called the Spittle Square in the Parish of Stepney, together with all tolls, tolns, dues, piccage, stallage, and other profits, advantages and emoluments whatsoever to such

(1) 9 App. Cas. 927.

markets in anywise belonging, appertaining, issuing or arising or with the same usually had and enjoyed. The House of Lords held in another case of *Attorney-General* v. *Horner* (1) that the market granted by the letters patent was not a market limited by metes and bounds and that the grant permitted the extension of the market beyond Spittle Square into the surrounding area if the market owners thought fit and had the means of so doing.

The franchise of market and the freehold lands forming the then site of the market were transferred to the use of the plaintiffs, the Corporation, in fee simple by a conveyance dated May 8, 1902. Four private Acts of Parliament have been passed with reference to the market. The first which I think it necessary to refer to is the City of London (Spitalfields Market) Act, 1902. This Act contains in s. 3 a definition of the undertaking. It conferred by s. 5 power to the Corporation to acquire the undertaking so far as not already acquired by the Corporation. By s. 9 the Corporation was also given power to purchase any lands which they might require for the purpose of enlarging and improving the market or the approaches thereto. By s. 16 power was given to the Corporation to make such by-laws as they might think fit for a number of purposes; but no by-laws have in fact been made. Sect. 29 provides that the Corporation should not let or otherwise dispose of any stall or standing in Spitalfields Market for a longer period than one week. By the City of London (Various Powers) Act, 1914, the Corporation was, amongst other things, empowered to execute certain improvements, and by s. 12 the Corporation was empowered to take and use certain specified lands for the purposes of providing space for the erection of buildings adjoining or near to the market or for the purpose of recoupment or exchange or for any purpose in connection with Spitalfields Market. Under this Act the Corporation duly acquired certain lands.

By the City of London (Various Powers) Act, 1922, various further powers were given to the Corporation, and by s. 19 it was provided that it should be lawful for the Corporation

(1) 11 App. Cas. 66.

on every day of the week, except Sunday, to hold, keep and maintain the market. It also contained a provision empowering the Corporation to levy, receive and recover market dues, tolls and such like payments at or in respect of the market from the sellers or salesmen of commodities in the market. This was subject to the Corporation completing certain improvements which they did in fact complete. It should perhaps be mentioned that at the date of the trial the main market comprised sixty-eight shops or warehouses and one hundred and eighty-eight stands, let on weekly tenancies to a number of tenants. The learned judge held that apart from the stands there was no space in the main market or in the streets or buildings surrounding it upon which members of the public desiring to sell fruit, vegetables and other commodities could expose their wares for sale. The market is now held on every week-day and is used for the sale of fruit, vegetables and other like commodities. It has never in recent times been used as a general market. The Corporation is, we were informed, the owner of several other markets in the City, including those well known by the names of Smithfield, Billingsgate and Islington. It may be mentioned that the other important fruit and vegetable and flower market in London is Covent Garden Market, which is in private hands.

According to the finding of the learned judge, auction sales of fruit and vegetables were carried on from time to time in the original market and in the western extension of it, though the business of selling such commodities has mainly been carried on by private treaty by the tenants of the shops and stands. There was no difficulty in obtaining facilities for holding such an auction generally about 2 o'clock in the afternoon, and no inconvenience was proved to have been caused to any one by the holding of these auctions. The learned judge did not accept the evidence of Major Millman on behalf of the Corporation that the auctions became very objectionable owing to the ringing of a bell used to inform persons in the market that the auction was about to take place. The bell in fact was rung by the directions of the

Corporation. After the year 1924 the auction sales were held in several different premises belonging to the Corporation in the vicinity of the market, and these sales again caused no inconvenience to any one engaged in selling goods in the original market or in the western extension. The last sale by auction before the opening of a building called the London Fruit Exchange, used for a purpose which I must deal with in some detail, took place on July 30, 1929.

The London Fruit Exchange is erected on a site which with other premises was acquired by the Corporation under the Act of 1914 above referred to. By a lease dated July 4, 1930, and made between the Corporation of the first part, the London Fruit Exchange Brokers' Association, Ld., of the second part, and five companies and a firm who collectively are described as the guarantors of the third part, the Corporation demised to the London Fruit Exchange Brokers' Association, Ld., the basement, ground, first and second floors of a building which had been erected, known as the London Fruit Exchange and Auction Sales Building, together with a number of other facilities for the term of twenty-one years from September 29, 1929. The annual sum payable by the lessees during the continuance of the term is 24,000*l.*, of which 14,000*l.* is expressed to be in respect of rent and 10,000*l.* is expressed to be in lieu of any tolls. The lessees covenant, amongst other things, not to use the premises for any other business than that of sale by auction or otherwise of fruit, vegetables or other commodities of the like nature and as offices in connection therewith, and they covenanted at all times to develop to the utmost of their power the business of the sale by auction of fruit, vegetables or other commodities of a like nature and to comply with the by-laws, rules, orders and regulations for the time being in force governing Spitalfields Market, so far as the same might be applicable to the said business. The lessees went into possession of the demised premises some months before the lease was granted and sales by auction in the premises started in September, 1929. The lessees and the guarantors endeavoured to obtain from the Corporation the sole and exclusive right to sell by auction in the market fruit, vegetables and such like commodities and the Corporation was not unwilling to concede this right, but was advised that it was inexpedient to enter into any covenant to that effect, on the ground that such a covenant was illegal. The lease was finally granted in its present form on the faith of a letter written on behalf of the Corporation, dated June 20, 1930, in the following terms [His Lordship read the letter]. Since July 30, 1929, the Corporation have consistently refused to consent to the holding by any person, firm, or company of any sale by auction of the commodities in question in or near the market, except by one of the companies or firms (whom I will refer to as "the six brokers") constituting the London Fruit Exchange Brokers' Association, Ld. In effect, the Corporation claims by virtue of its privilege a right to confer upon any companies or firms at its pleasure the monopoly of carrying on the well known business of auctioneers of fruit and vegetables within the market or near the market. It should be added that the London Fruit Exchange Brokers' Association, Ld., only permit persons armed with cards to obtain admission to their sale-rooms and that the cards or tickets contain the following clause: "The user of this ticket undertakes not to sell to or buy from or attempt to trade with any person or persons while in the Fruit Exchange except the brokers who are members of this Association." The granting or refusing of tickets of admission to the Exchange is apparently a matter left to the will and pleasure of the six brokers, and it was proved that an application for a ticket of admission was refused to one J. Lyons, the managing director and promoter of the defendant company.

The defendant company was incorporated on September 30, 1931, and since its incorporation has carried on business as fruit brokers in rooms at Nos. 36 and 37 Steward Street, in close proximity to the market. The learned judge has held that there is no evidence to support the defendants' contention that the Corporation have included in the market area that part of Nos. 36 and 37 Steward Street which is in the

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occupation of the defendants. The business of the defendants consists in selling by auction fruit belonging in part to themselves, but chiefly to other persons, in which case the sales are, of course, on commission. These sales have mainly been sales by sample of imported fruit to wholesale dealers. The defendants have always been ready and willing to pay to the plaintiffs the reasonable and customary market tolls in respect of the business carried on by them at Nos. 36 and 37 Steward Street; but the plaintiffs have refused to accept the same. It should be added that the Corporation since it acquired the market in the year 1920 has demanded and obtained sums of money, designated in the books of the Corporation as tolls, from persons or firms engaged in the sale of fruit and vegetables in shops and premises outside the area occupied by the market and the surrounding streets, and the learned judge has drawn the inference that the Corporation by imposing and accepting the payments has agreed to treat the premises in respect of which payments were made as included within the market, at any rate, so long as the respective agreements to make such payments remained in force.

It is well settled that when a market ought lawfully to be held, every member of the public has of common right the liberty to enter and frequent the market place for the purpose of exposing for sale and selling or of buying such commodities as are vendible in the market: see *Austin* v. *Whittred* (1); *Townend* v. *Woodruff* (2); *Prince* v. *Lewis* (3); *Duke of Newcastle* v. *Worksop Urban District Council.* (4) It follows in my opinion that the London Fruit Exchange has never been used for the purposes of a market, since the public has never been allowed access thereto, either for the purpose of buying or selling.

The claim of the Corporation amounts to this—that the selling by auction of fruit and vegetables is a course of dealing which the Corporation is at liberty to prevent, both in the Spitalfields Market and elsewhere within the common law limits of a market. The Corporation bases its contention on the ground that the acts of the defendants amount to the levying of a rival market. If this is correct, the Corporation would be entitled to rely upon the decision of the House of Lords in *Great Eastern Ry. Co.* v. *Goldsmid* (1), by which it is established that, if a rival market is set up, this is such a disturbance of the original market rights that, even if it is proved that there is not such accommodation provided by the owners of the franchise in their market, that circumstance would afford no answer to the action for an injunction. On the other hand, it is not in dispute that an obligation is cast upon the owner of a market to provide convenient accommodation for all who are ready to buy and sell in the public market, and that, if he does not do so or if he allows the market or part of it to be employed for other purposes without providing as convenient a place for the public to buy and sell in elsewhere within the limits of his grant, one consequence will be that there would be a good defence to an action brought by the grantee of the franchise against any person for selling out of the market to the prejudice of his right, provided such person has been prevented from selling in the market by the want of convenient room. I am here in substance quoting from the opinions of the judges in the case of the *Islington Market Bill.* (2) The judges approved of the decision of the Court of King's Bench in *Prince* v. *Lewis* (3), a case which related to Covent Garden Market. The distinction, in my opinion, is between establishing a rival market at which the public or a section of the public is invited to come for the purpose of buying and selling, and the carrying on by an individual, firm or company of the business of selling goods for their own benefit. If the present case were one of mere disturbance of market, the Corporation would, I think, have considerable difficulty in establishing that the disturbance is of an actionable kind, since it was not done with intent to evade payment of a toll: *Brecon Corporation* v. *Edwards* (4); but however this may be, it cannot be doubted that if there were a mere disturbance prima facie actionable it would be excused, since at the time and under the circumstances of

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(1) Willes, 623 *n*.
(2) (1850) 5 Ex. 506.
(3) 5 B. & C. 363.
(4) [1902] 2 Ch. 145, 159.

(1) 9 App. Cas. 927.

(2) 3 Cl. & F. 513, 518.

(3) 5 B. & C. 363.

(4) (1863) 1 H. & C. 51.

the sales by the defendant he was being excluded from selling goods by auction in the place at which the market was held.

The question then arises as to the meaning of the phrase "levying a rival market." There is no doubt that a franchise of market involves a right to be protected from the setting up of a rival market within a distance of seven miles or, more strictly, six and two-third miles (Bracton, Book IV., c. 46: Comyns's Digest Market C.2), and if the rival market is held on the same day or days and within the common law distance, it is not necessary to prove actual damage: *Dorchester Corporation* v. *Ensor.* (1) In the case of *Great Eastern Ry. Co.* v. *Goldsmid* (2) and in *Wilcox* v. *Steel* (3) the Lords of Appeal and the Lords Justices seem alike to have taken the view that it was necessary to consider the facts and to see whether as a matter of substance the defendant had established a new market rivalling the old market. In other words, it is a question of substance in each case whether the defendant is establishing a new rival market within the common law distance of an old market. No doubt a rival market held within the limit on the same day or days is prima facie injurious to the old market, since it is an invasion of a franchise; and on the other hand, it is clear that it is not necessary that the rival market should purport to be a franchise market, nor is it necessary that the defendant should have any intention of setting up a rival market if what he does amounts to such a rival market. I must here observe that unless the question whether or not a rival market has been established is a question of fact to be considered having regard to all the circumstances of the case, as the authorities cited seem to show, the results in law are very extraordinary. In the present case (as in many others) the market is a general market under the charter of Charles II., though confined, as I have said, in practice to the sale of fruit and vegetables and like commodities. The common law right to restrain the setting up of a rival market extends to the whole radius of nearly seven miles, and if there is no necessity to

(1) L. R. 4 Ex. 335, 343.
(2) 9 App. Cas. 927.
(3) [1904] 1 Ch. 212.

establish any pecuniary damage, or the probability of such damage, the monopoly conferred upon the Corporation under the franchise would prima facie extend to a right to prevent the setting up of markets of every character over an area of some 150 square miles containing a vast population, and although the goods sold were not fruit and vegetables. Further, if the Corporation is right in its contention that every sale by auction amounts to the levying of a rival market, it would seem to follow that within the common law limit, every sale by the hundreds of auctioneers who carry on business within the limit might be restrained by the Corporation, although such sales in no way injure the Corporation and although the auctions were of goods which have never been sold at Spitalfields Market. We were invited not to be surprised at such a result, having regard to the peculiar nature of market rights; but for my part, in the complete absence of any authority to show that the rights of market owners are so extensive in character I hesitate before acceding to the contention. It seems to me that in order to establish the fact that a rival market is being levied it is necessary to show that the defendant is providing facilities for a concourse of buyers and sellers of goods ordinarily dealt with in the plaintiff's market, so that there is a prima facie fraud upon the market owner (to use an old phrase), in other words, so that there is a probability of his being deprived of tolls, stallages or other profits or emoluments appertaining to the market. To put it in another way, there must be an element of rivalry in the case. I do not doubt that a man may set up such an auction mart as to amount to a rival market. The cases of *Great Eastern Ry. Co.* v. *Goldsmid* (1) and *Wilcox* v. *Steel* (2) are examples. I do, however, deny that an auction sale or periodical auction sales necessarily amount to the levying of rival markets, and I do not see any reason for thinking that the hundreds of auction rooms where chattels and goods are sold in London, and in most of the cities and towns of England, were established by and exist on the sufferance of market owners. Do the acts of the defendants

(1) 9 App. Cas. 927.

(2) [1904] 1 Ch. 212.

in this case amount to the levying of a rival market? Their business consists, as alleged by the plaintiffs, "In selling by auction fruit belonging mainly, if not entirely, not to themselves but to a large number of persons, such sales being on commission." The sales are stated to have been extensive, and the defendants no doubt to some extent take advantage of the concourse of buyers at the market and of the fact that their premises are in the neighbourhood of the market. The defendants advertise their sales by advertisements or notices. The sales are mainly of imported fruit. The premises of the defendants, as I have already stated, are not included in the market area, because the Corporation declines so to include them. The sales they effect are in a private room to wholesalers only, and they are sale by sample. The notices of the sales have been distributed through the medium of the Post Office. The defendants, I repeat, have no desire to avoid payment of the customary tolls, and they have been in effect forced to take the action they have taken because of the refusal of the Corporation to include their premises in the market or to allow them to sell by auction in the market area.

It is matter of common knowledge that sales by auction by auctioneers selling on commission have been a common practice in markets in London, and I would add, all over the country. For example, such sales are and have for many years past been the ordinary way of disposing of large quantities of fruit and vegetables in Covent Garden Market, originally founded, like the Spitalfields Market, by a charter of Charles II. Nearly all imported fruit is sold to wholesalers in that market by auction. At Billingsgate every one knows that the sales of trawl fish are effected by auction, and that land borne fish are sometimes sold by auction and sometimes by private sale. The same is true of the markets at Hull and Grimsby. It is also matter of common knowledge that at markets and fairs for the sale of cattle and horses such animals are to a large extent sold by auction in the market. I have not been able to find in the evidence in this case any ground for the view that a vendor in the market is not entitled to sell his goods by auction to the highest bidder. On the other hand, nobody has ever suggested that a vendor of goods in a market is entitled only to sell his own goods. So long as the proper toll is paid, how is the market owner prejudiced? I do not understand why there should be any objection to a salesman in a market acting as agent for the sale of the goods of others, whether for a commission or otherwise. Commission agents in fact abound in large markets. No good reason has been suggested for the view that an auctioneer is making an improper use of a market if he sells the goods of others by auction in the usual way. In all the many authorities upon market law, I have not found any suggestion in any judgment that such sales by auction are not, subject of course to reasonable regulations, permissible to all members of the public who attend the market, and it is quite certain that such sales in the case of fish, cattle, and horses have been perfectly usual all over the country for many years, if not from time immemorial. The reason is not far to seek. Where the circumstances are such that the goods sold or intended to be sold in the market cannot in practice be removed, if unsold, by the persons who have brought them to the market, private sales afford a most unsatisfactory method of dealing with the commodities in question, because the vendor, if he is unable to sell by auction, is bound when buyers are scarce or hesitating to keep on reducing his prices, sometimes to a ruinous extent, during the time the market continues in order to get rid of them. These considerations apply with great force to foreign fruit. Cargoes of fruit arrive day after day at the London docks, and the importers have to get rid of them to the wholesale distributors without delay. It is plain from the evidence that, with regard to the enormous business of the sale of imported fruit, a very large proportion is now sold by auction to wholesalers in London. An illustration of the modern tendency in regard to imported fruit is to be found in the report, dated January 29, 1928, by Major Millman, the clerk and superintendent of Spitalfields Market, to the chairman and members of the Central Markets committee. He stated amongst other things that at that date the total imports of fruit from abroad amounted to nearly fifty millions per annum, and were rapidly increasing. On December 17, 1929, after the six brokers had commenced their business, Major Millman in a memorandum of that date stated that the six brokers in one week had sold as many packages as Mr. Lyons had sold in six years, and that the six brokers had sold 70,000 packages in one day, these goods being, of course, disposed of in the ordinary way by auction. The amount of fruit and vegetables now sold by the six brokers at the Fruit Exchange has grown to huge figures.

The decision of my brother Romer (then Romer J.) in *Nicholls* v. *Tavistock Urban District Council* (1) supports the view that sales by auction are a proper exercise of the rights of salesmen in a market. I have already noted that auction sales were held in the main market at Spitalfields at least as early as the year 1897, and were permitted by the Corporation after they took over the conduct of the market till July, 1929. The London Fruit Exchange was built by the Corporation for the express purpose of giving adequate facilities for the sale by auction of foreign fruit, and I draw the inference that at the present time foreign fruit cannot in practice be sold to the large wholesalers in any other way.

In my opinion then such sales by auction as the defendants have effected would have been a proper exercise of the rights of salesmen in Spitalfields Market, and therefore the declaration granted on the counterclaim of the defendants should stand. It does not necessarily follow that such sales by auction outside the market do not amount to the levying of a rival market; but, as I have said, all the circumstances of the case must be considered and the element of rivalry in some sense must be established. For reasons of their own the Corporation have ceased to permit sales by auction of fruit in the market. It is a branch of the trade no longer carried on in the market, and they are in no way prejudiced, as matters stand, by the defendants' acts. To this fact it should be added, first that the defendants have offered to

(1) [1923] 2 Ch. 18.

treat their premises as added to the market, and in any event to pay lawful tolls, and secondly, that their sales are held in private, and to wholesalers only. The mere fact that the defendants cause to assemble a certain concourse of buyers (though not of sellers) at certain hours does not itself create a rival market. If it did, every large shop within the common law limit, or at any rate, every large shop which by its nearness to a market takes advantage of the existence of the market, might be forced by the market owner to close its doors. It is too late to set up any such contention in our Courts, though it might perhaps have succeeded three hundred years ago, when shops were few and goods were generally bought and sold in a market. It may be here observed that markets in ancient days were usually employed for the purpose of selling goods retail, and that the tolls were payable in respect of goods which were brought into the market for that purpose. Markets in modern times have largely been used for the purpose of sales to wholesalers, and I repeat that the modern trade in relation to imported fruit, involving as it does an elaborate system of distribution, is generally effected by sales by auction to wholesale distributors, the sales being by sample. Although in an action for disturbance by setting up a rival market it is not necessary to show that the defendant should have intended to evade the payment of toll, I am of opinion that the fact that he is willing to pay the proper tolls, whatever they may be, and that he is not selling in the market only because the market owner declines to allow him to sell his goods in the way in which he desires to sell them, namely by auction, is a circumstance of great importance which has to be borne in mind in considering whether as a fact his acts amount to a setting up of a rival market: see *Brecon Corporation* v. *Edwards* (1), and particularly the judgments of Bramwell B. and Wilde B.

I have not thought it necessary to repeat the remarks made by my brother Romer on the various authorities relied on by the Corporation as tending to show that any auction sale within the common law limit of the market amounts to

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(1) 1 H. & C. 51.

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the establishment of a rival market. In most of these cases the element of rivalry clearly existed, tolls were being evaded, and it was reasonably plain that the defendants' actions were calculated seriously to damage the market owner. The Court of Appeal in *Elwes* v. *Payne* (1) (overruling Sir George Jessel and thus I think diminishing the value of his dicta) declined to grant an interlocutory injunction to restrain the defendants from holding auction sales within half-a-mile of the plaintiffs' market on a day different from the usual market day. The judgment of James L.J. seems to me strongly to support the view that unless damage is proved or can be inferred the market owner has no right to complain.

In all the circumstances I come to the conclusion that what the defendants are doing does not as a fact amount to the levying of a rival market. As I understand the judgment appealed from, the learned judge arrived at that conclusion of fact, and I not only do not differ, but for the reasons I have endeavoured to give, I have arrived at the same conclusion.

I wish to add for myself that even if I thought that technically the defendants' acts do amount to the levying of a rival market, I should not in the special circumstances of the case have thought it right to grant the injunction claimed by the Corporation. The remedy by injunction is an equitable remedy, and when it is sought to protect a monopoly such as a franchise of market I think it is the duty of the Court to decline to grant the injunction if the owners of the franchise are seeking not to protect their own rights but to carry out an understanding with third parties to whom they have in effect promised a monopoly which they could not properly confer on them. Those, I think, are the facts in this remarkable case.

In the result the appeal must be dismissed.

Appeal dismissed.

Solicitors: *A. F. I. Pickford; Edward Betteley, Smith & Stirling.*

H. C. G.

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(1) 12 Ch. D. 468.

In re ORLEBAR.

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June 25, 26;
July 2.

[1934. O. 2060.]

Will—Construction—Condition of Residence—Provision tending to induce abstention from exercising Settled Land Act Power of Sale—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *s.* 106.

Under the will of a testator who died in 1879, the Crawley Estate stood limited to the use of his grandson Orlando for an estate in tail, with remainder to the use of the testator's daughter V. W. her heirs and assigns.

V. W., who died in 1919, by her will devised the estate to which she was so entitled in remainder, to the use of certain persons successively in strict settlement subject to a condition that if the person who should so become entitled to that estate as tenant for life or tenant in tail should fail to reside at Crawley House for a certain part of every year, the estate of such person therein should cease and determine. The testatrix then bequeathed her residuary estate upon trust for her nephew Orlando for life and directed that, after his death, in case the Crawley Estate or the greater part in value thereof should not then devolve upon the limitations of her will, a sum of 10,000*l.* should be raised out of her residuary estate and held upon trust for certain charitable purposes, and that the remainder should be upon trust for the persons therein named.

The main question was whether, in the event of Orlando (who was tenant in tail in possession and also the heir at law and sole next of kin of the testatrix and had no intention of disentailing the estate) exercising his power of sale over the estate under the Settled Land Act, 1925 (see s. 20, sub-s. 1 (i.), and s. 117, sub-s. 1 (xxviii.)), the residuary estate of the testatrix would fall to be administered under the trusts declared by her will concerning the same:—

Held, (1.) that in the event aforesaid, upon the proper construction of the testatrix's will, the Crawley Estate would not on the death of Orlando devolve upon the limitations of the will, with the result that the condition upon which the disposition of her residuary estate depended would be fulfilled; and (2.) that, as the effect of that disposition would be to prevent the residuary estate from passing, as upon an intestacy, to Orlando as sole next of kin of the testatrix, it would necessarily tend to induce him to abstain from exercising his power of sale under the Settled Land Act, 1925, within the meaning of s. 106 of that Act; and, accordingly, the residuary estate would, subject to Orlando's

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life interest therein, pass to him as upon an intestacy, by reason of the invalidity of the disposition thereof contained in the testatrix's will.

ADJOURNED SUMMONS.

Under the will dated April 9, 1872, of Robert Shipton Orlebar, who died on January 8, 1879, the Crawley Estate in the County of Bedford stood limited, at the material date, to the use of his grandson Orlando R. A. Orlebar during his life with remainder to the heirs of the body of his said grandson with remainder to the use of the testator's daughter Valentina Augusta her heirs and assigns for ever.

The testator's said daughter married Mr. Wynter and died on October 30, 1919, having by her will bequeathed the furniture and effects at Crawley House in trust for her nephew the said Orlando R. A. Orlebar during his life upon condition that he allowed the same to remain at Crawley House, and directed that if Crawley House should, after his death, devolve under the limitations of her will, those chattels should be enjoyed, as heirlooms, by the person for the time being entitled to Crawley House under the limitations of her will, but if Crawley House should not so devolve, then in trust for such relative of the testatrix of the name of Orlebar who should become entitled to Crawley House whether for life in fee or in tail, and if no such person, the settled chattels were to fall into her residuary estate. The testatrix then by the latter part of clause 8 of her will devised the Crawley Estate (to which she was so entitled in remainder under the will of her father, Robert Shipton Orlebar) after limitations to uses in favour of certain persons successively in strict settlement more particularly referred to in the judgment of Clauson J. and which were revoked by codicils to the testatrix's will, to the use of the defendant Edward Yarde Orlebar for life with remainder to his son, the defendant Godfrey Orlebar for life with divers remainders over, with an ultimate remainder to the testatrix's own right heirs : and it was provided that every person who should become entitled to the Crawley Estate as tenant for life or in tail should reside at Crawley House and if such person should fail to reside there, the estate of such person in the Crawley Estate should determine and in the case of a tenant for life go and remain to the use of the trustees during the life of such person in trust to permit the rents and profits to be received by the person or persons for the time being entitled in remainder immediately expectant upon the death of such tenant for life and in the case of a tenant in tail male or in tail by purchase whose estate should have so determined the Crawley Estate should devolve to the person or persons who would be entitled under the will if such tenant in tail male or in tail were then dead without issue. The testatrix then (by clause 10) gave her residuary estate upon trust for sale and conversion and directed her trustees to hold her residuary estate upon trust to pay the income thereof to Orlando R. A. Orlebar during his life and after his death in case the Crawley Estate "as existing at my death or the greater part thereof in value" should on his death devolve under the said limitations of her will, then upon the trusts which would be applicable to her residuary estate if the same were capital moneys arising from a sale under the Settled Land Acts, 1882 to 1890, of the Crawley Estate, but in case that estate or the greater part in value thereof should not so devolve, then upon trust, after raising thereout a sum of 10,000*l.* to be applied for certain charitable purposes, as to the residue thereof for the legatees therein named (being certain other members of the Orlebar family).

Orlando R. A. Orlebar, who thus was tenant in tail in possession and also the heir at law and sole next of kin of the testatrix and had no present intention of disentailing the estate, took out this summons to have it determined: in the event of his exercising his power of sale under the Settled Land Act, 1925, (*a*) what would be the effect of the condition as to residence upon the provisions of the will, and (*b*) upon what trusts, after the death of the plaintiff, would (i.) the settled chattels, (ii.) the residuary estate, be held.

F. McMullan for the plaintiff. The plaintiff has no intention to bar the entail: he desires that the Crawley Estate should devolve upon the limitations indicated in the

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will of his aunt, Mrs. Wynter. If he were to exercise his power of sale under the Settled Land Act, 1925 (which is conferred upon him by virtue of s. 20, sub-s. 1 (i.), and s. 117, sub-s. 1 (xxviii.), of that Act), the condition as to residence imposed by the will upon the tenant for life would become inoperative, the gift over in the event of non-residence would be void and the tenant for life would not forfeit his life estate in the capital moneys representing the proceeds of sale: *In re Acklom. Oakeshott* v. *Hawkins* (1); *In re Richardson. Richardson* v. *Richardson.* (2) In the event of the plaintiff exercising his power of sale under the said Act over the Crawley Estate, the proceeds of such sale would devolve as land. Upon the true construction of the words in clause 10 of the will—namely: "in case the Crawley Estate 'as existing at my death or the greater part in value thereof' should on his (i.e. the plaintiff's) death devolve under the limitations of the will" the condition thereby made is fulfilled, if the proceeds of sale of the Crawley Estate devolve under the limitations of the will of the testatrix, because such proceeds represent the estate. Accordingly, if the estate is sold and the proceeds of sale devolve under the limitations of the will, the condition will be fulfilled according to which it was provided that, after the plaintiff's death, the residuary estate of the testatrix should be held upon the trusts which would be applicable if the same were capital moneys arising from the sale of the Crawley Estate; in other words, would go to the persons entitled under the limitations of the will to the Crawley Estate.

[After hearing counsel representing other parties interested upon the point of construction, Clauson J. held that upon the true construction of those words in clause 10 of the will, the residuary estate would only go upon the trusts which would be applicable thereto if the same were capital moneys arising from the sale of the Crawley Estate, if the Crawley Estate should devolve in the form of actual land and in no other form under the limitations of the will.]

Humphrey H. King for the defendant Edward Yarde Orlebar, the first tenant for life of the Crawley Estate under the limitations of the will, and his son, the defendant Godfrey Orlebar. The provision in the will that, if the Crawley Estate should not devolve under the limitations in the will mentioned, the residuary estate should go upon the trusts in favour of objects and persons other than the persons who should enjoy the Crawley Estate, must be deemed to be void within the meaning of s. 106 of the Settled Land Act, 1925 (1), because that provision tends to induce the plaintiff (who is desirous that the Crawley Estate should be kept in the Orlebar family and that the residuary estate should go to the members of that family in the enjoyment of that estate) to abstain from exercising his power of sale under the Settled Land Act, 1925, or would or might have that operation.

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(1) [1929] 1 Ch. 195.

(2) [1904] 2 Ch. 777.

Maurice Berkeley for the trustees of Mrs. Wynter's will.

F. E. Skone James for the legatees of the ultimate residue. If the Crawley Estate should not devolve under the limitations of the will, as would happen if the estate were to be sold, the residuary estate would then go, subject to the raising of a sum for charitable purposes, to the ultimate residuary legatees, who are members of the Orlebar family. If the Crawley Estate is not sold and does devolve under the limitations of the will, the residuary estate would go on trust for other members of the Orlebar family. In the absence of evidence as to which of these alternative methods of devolution the plaintiff would prefer, it is difficult, if not impossible, for the Court to determine whether or not the gift to the ultimate residuary legatees tends to induce the plaintiff to abstain from exercising his power of sale. Unless there is such evidence, it cannot be decided that the gift is made void by s. 106 of the Settled Land Act, 1925. In any case, the inducement for the purposes of that section must be pecuniary and not merely sentimental.

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(1) Sect. 106, sub-s. 1: "If in a settlement, will, assurance, or other instrument executed or made before or after, or partly before and partly after, the commencement of this Act a provision is inserted—

(*a*) purporting or attempting, by way of direction, declaration, or otherwise, to forbid a tenant for life or statutory owner to exercise any power under this Act, or his right to require the settled land to be vested in him; or

(*b*) attempting, or tending, or intended, by a limitation, gift, or disposition over of settled land or by a limitation, gift, or disposition of other real or any personal property, or by the imposition of any condition, or by forfeiture, or in any other manner whatever, to prohibit or prevent him from exercising, or to induce him to abstain from exercising, or to put him into a position inconsistent with his exercising, any power under this Act, or his right to require the settled land to be vested in him;

that provision, as far as it purports, or attempts, or tends, or is intended to have, or would or might have, the operation aforesaid, shall be deemed to be void."

A. Andrewes-Uthwatt for the Attorney-General.

Cur adv. vult.

July 2. CLAUSON J. On October 30, 1919, died a Mrs. Valentina Augusta Wynter. At that moment certain family estates, which it is convenient to refer to as the Crawley Estates, stood settled to the use of the plaintiff, Orlando Orlebar, who was the son of a sister of Mrs. Wynter, for life with remainder to the heirs of his body, with remainder to Mrs. Wynter absolutely. It was apparently supposed, at the time, that the plaintiff was tenant for life with remainder to the heirs of his body, if any, but it is recognized now that in view of the rule in *Shelley's Case* (1) the true position was that he was tenant in tail with remainder to Mrs. Wynter. He had not then, and he has not now, barred his estate tail, and I was told that he has made up his mind not to do so. The testatrix, Mrs. Wynter, left residuary estate of the value of somewhere about 15,000*l.* The plaintiff was the only nephew of Mrs. Wynter and he was her heir at law and sole next of kin.

Mrs. Wynter's will contained clause 6, which I will proceed to read: "I bequeath all furniture glass plate" and so forth "belonging to me at the time of my death and situate in or about Crawley House in the County of Bedford (which furniture glass plate and plated articles pewter linen books china and pictures miniatures and prints bequeathed by this clause are hereinafter referred to as 'the settled chattels') unto my trustees upon the trusts hereinafter directed, namely:

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(1) (1579–1581) 1 Co. Rep. 93*b*.

I direct that my trustees shall permit my nephew "—that is the plaintiff—" to have the use and enjoyment of the settled chattels during his life upon condition that he allows the same to remain at Crawley House in the same manner substantially as at the time of my death and I give this direction in the hope that my said nephew will make Crawley House his principal place of residence during his life subject as aforesaid I direct that the settled chattels shall be held by my trustees upon the trusts following namely :—In case Crawley House shall after the death of my said nephew devolve under the limitations of this my will then upon trust to permit the settled chattels to be used and enjoyed as heirlooms by the person or persons for the time being entitled to Crawley House under the limitations of this my will and as nearly as the rules of law and equity will permit but so that the same shall not vest absolutely in any person," and then there is the usual clause which I need not read. Then : " But in case Crawley House shall not after the death of my said nephew devolve under the limitations of this my will then upon trust for such relative of mine of the name of Orlebar who upon the death of my said nephew shall become entitled to Crawley House whether for an estate for life in fee or in tail and if there shall be no such person then I direct that the settled chattels shall fall into and form part of my residuary personal estate hereinafter bequeathed." Then there are directions about an inventory.

Now it is clear that, if Crawley House is sold by the plaintiff under the powers vested in him under the Settled Land Act, it will not devolve under Mrs. Wynter's will and, accordingly, in that event, the gift of chattels in clause 6, in so far as it directs the chattels to be used and enjoyed as heirlooms, will be inoperative. The question whether in such case these chattels might, in certain events, devolve on a relative of the testatrix of the name of Orlebar should he have acquired, presumably through some purchase, an estate in Crawley House, seems to me to be open. Before reading the next clause, let me say this : the plaintiff, the tenant in tail, appears to me to be a tenant for life within the meaning of that term as used in s. 51 of the Settled Land Act, 1882, and s. 106 of the Settled Land Act, 1925, in view of the provisions of s. 58 of the former Act and s. 20, sub-s. 1 (i.), and s. 117, sub-s. 1 (xxviii.), of the latter. Now I go on to clause 8 of the will. The question which arises under clause 8 is as to a certain condition requiring residence at Crawley House. That clause contains recitals that the hereditaments in the County of Bedford usually known as the Crawley Estate (which hereditaments included Crawley House) were settled by the will of the testatrix's late father Robert Shipton Orlebar to the use (after the death of her mother and subject to an annuity in favour of the testatrix) of her late brother-in-law Orlando Robert Hammond Orlebar during his life with remainder to the use of her said nephew Orlando Robert Aplin Orlebar during his life with remainder to the heirs of the body of the said Orlando Robert Aplin Orlebar with an ultimate remainder to the use of the testatrix her heirs and assigns for ever, then that the testatrix was desirous of providing for the event of the said hereditaments devolving under the said ultimate limitation, but so nevertheless that no person should be put to any election owing to the disposition thereinafter contained, that she was also desirous of disposing of her freehold cottage at Walton in the County of Bucks in manner thereinafter mentioned. Then the latter part of clause 8 contains a devise of the Crawley Estate and all other the hereditaments to which under the said will or any conveyance the testatrix was or might be entitled for any estate or interest in remainder and also her said freehold cottage at Walton in the County of Bucks (all of which hereditaments were thereinafter referred to as " the Crawley and Walton Estates ") to the use of her cousin Evelyn Orlebar during his life without impeachment of waste with remainder to the use of his son Robert Evelyn Orlebar during his life without impeachment of waste with remainder to the use of the first and every other son of the said Robert Evelyn Orlebar successively in remainder one after the other according to their respective seniorities in tail male, with remainder to the use of Augustus Orlebar, during his life with remainder to uses in favour of his sons successively and their sons in tail male (all which uses were revoked by codicils to the testatrix's will) with remainder to the use of Edward Yarde Orlebar during his life with remainder to his sons successively and after various other remainders to the use of the testatrix's own right heirs " Provided always that every person who shall become entitled under my will to the said Crawley Estate hereinbefore devised as tenant for life or tenant in tail male or in tail by purchase in possession shall reside at Crawley House aforesaid for at least six calendar months (either continuous or discontinuous) in every year (meaning thereby every complete period of twelve calendar months) and if the person so becoming entitled as aforesaid shall fail to comply with the direction last hereinbefore contained (not being prevented from so doing by illness or accident) then and in such case the estate of such person shall cease and determine."

Now it was argued by counsel, and I agree, that in the event of a sale of Crawley House by the plaintiff under his Settled Land Act powers, the condition of residence imposed by this clause in the will will be inoperative. The reasons seem to me to be obvious, and I do not think I need pursue that matter.

Now I come to clause 10. By clause 10 the lady devises and bequeaths her real estate and her personal estate to trustees upon trust for sale and conversion and out of the proceeds of conversion to pay legacies and so forth and to invest the residue and to stand possessed of the rest of the investments (thereinafter called " her residuary estate ") upon trust to pay the income to the plaintiff " during his life and after his death in case the Crawley Estate as existing at my death or the greater part in value thereof shall on his death devolve under the limitations of this my will then upon the trusts which would be applicable to my residuary estate if the same were capital money or investments of capital money arising from the sale under the Settled Land Acts 1882 to 1890 of the Crawley Estate or the part thereof which shall so devolve and so as to be primarily liable to be invested in the purchase of land in fee simple to be conveyed to the uses affecting the said Crawley Estate or the part thereof which shall so devolve but in case the Crawley Estate or the greater part thereof shall not on the death of my said nephew devolve under the limitations of this my will then upon trust to raise out of my residuary estate the sum of 10,000*l.* sterling and hold the same upon the trusts hereinafter declared concerning the same and to stand possessed of such part of my residuary estate as shall remain after raising the said sum of 10,000*l.* as to 5000*l.* part thereof upon trust for Knightly Vere Orlebar son of the late Captain Vere Bernard Orlebar R.N. and as to the balance thereof upon trust for the said Robert Evelyn Orlebar and Henry Augustus Godfrey Thornton Orlebar in equal shares." There is a question, which I do not think it will be necessary for me to deal with, as to exactly who is intended by the legatees last named.

Now the question which I have to determine is whether these provisions in clause 10 of Mrs. Wynter's will have any and what operation in the event of her nephew, the plaintiff, who, it is to be remembered, is her heir at law and her next of kin, selling the Crawley Estate or the greater part of the value of it under his Settled Land Act powers. This would, before 1926, have turned on the question whether the provisions in question within the meaning of s. 51 of the Settled Land Act, 1882, tend by a disposition of property or in any other manner whatever to induce the plaintiff to abstain from exercising any Settled Land Act power and if they do so tend they are, so far as they do so tend, or would or might so tend, to be deemed void. Sect. 51 of the Act of 1882 is now replaced by s. 106 of the Settled Land Act, 1925, which for all material purposes is in precisely the same terms. In the first place I am of opinion that the expression " Crawley Estate as existing at my death " means the land which on October 30, 1919, was subject to the Crawley family settlement. If that land, or the greater part of it, is sold by the plaintiff under the Settled Land Act powers, the trusts in effect settling the testatrix's residue as capital moneys of the Crawley Estate will not arise, because the condition, namely, that the lands, or the greater part of them, in value, shall pass under the limitations of the testatrix's will, will not have been fulfilled, while, on the other hand, the words of the condition which govern the disposition of her residuary estate in that event will be fulfilled. But if that disposition operates, it will prevent the residue passing as upon an intestacy to the plaintiff, and it seems quite clear that the provision in question must necessarily tend to induce the plaintiff to abstain from exercising his Settled Land Act powers of sale. It results that the provision must, in the event of a sale by the plaintiff under the Settled Land Act powers, be inoperative.

I will declare that, in the event of the settled estate being sold or disposed of by the plaintiff in exercise of the powers conferred upon him by the Settled Land Act, 1925, the condition of residence imposed by the will of the testatrix upon the defendants Edward Yarde Orlebar and Godfrey Thornton Orlebar respectively as tenants for life will cease to have effect; that the trust in clause 6 to permit the settled chattels to be enjoyed as heirlooms will be inoperative; and lastly, that the testatrix's residuary estate will, subject to the life interest therein of the plaintiff, devolve as on an intestacy by reason of the invalidity of the provisions contained in clause 10 of the will for raising the 10,000*l.* thereout and holding the balance in trust as therein mentioned.

Solicitors: *Balderston, Warren & Co.; Treasury Solicitor.*

H. C. H.

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ARNING *v.* JAMES.

[1935. A. 3602.]

Settlement—No provision enabling trustees to charge for services—Appointment of new trustee to act with continuing trustee—Appointment of trust corporation as managing and sole custodian trustee—Deed of appointment wholly ineffective—Public Trustee Act, 1906 (6 *Edw.* 7, *c.* 55), *ss.* 2, 4.

One of two trustees under a settlement, which gave no power to trustees to charge for their services, was desirous of retiring from the trust. By a deed of appointment dated July 6, 1926, a bank was appointed to be managing trustee, together with the continuing trustee and, separately, custodian trustee, with the object of enabling it to charge fees under s. 4, sub-s. 3, of the Public Trustee Act, 1906 :—

Held, that the whole appointment was ineffective, and that the retiring trustee was never in his lifetime discharged from the trusts.

Forster v. *Williams Deacon's Bank Ld.* [1935] Ch. 359 applied.

ORIGINATING SUMMONS.

By a deed of settlement dated October 25, 1899, C. H. Arning (hereinafter called " the settlor ") gave certain articles of jewellery, pictures, plate and other effects and certain funds, shares and securities to his trustees upon trust to raise and pay thereout certain debts, liabilities, duties, costs and expenses, and subject thereto to pay the income thereof to the settlor during his life and after his death to pay the income to his daughter, the defendant Hilda Mary James, during her life for her separate use without power of anticipation, and after the death of the survivor of them, the trustees were to stand possessed of the trust fund and the income thereof in trust for the children or remoter issue of the defendant H. M. James as she should by will or deed appoint and in default of appointment in trust for all her children in equal shares and if she should have no children the fund was to be held upon certain other trusts. For the purposes of this application the interests of those other than the defendant H. M. James were represented by the infant defendant Peter Lionel James and the defendant Edith Hill Hudson. The settlor appointed the plaintiff Alfred William Arning and Sydney Hudson to be trustees of the settlement.

The income of the trust fund was duly paid to the settlor during his lifetime and since his death to the defendant H. M. James. The settlor died on March 16, 1918. In 1926 Sydney Hudson was desirous of retiring from the trusts of the settlement, and by a deed of appointment dated July 6, 1926, the plaintiff, the District Bank, Ld., was appointed to be trustee, together with the continuing trustee, and to be treated not only as managing trustee, but separately as custodian trustee with such functions, duties and powers as appertained to a custodian trustee under s. 4 of the Public Trustee Act, 1906, with provision for remuneration for its services as custodian trustee. After the execution of that deed the trust property was transferred to the Bank, which had since acted as custodian trustee and also as one of the managing trustees of the settlement.

The defendant H. M. James has had only one child, the defendant P. L. James.

The Court of Appeal in *Forster* v. *Williams Deacon's Bank Ld.* (1), held that it was impossible to appoint a corporation to be at the same time both managing and custodian trustee of a trust instrument, but it left undecided the question whether such an attempted appointment was wholly inoperative or had the effect of constituting the corporation an ordinary trustee, without power to charge fees.

In these circumstances, the plaintiff trustees took out this summons, asking that it might be declared whether upon the true construction or by virtue of the deed of appointment of July 6, 1926, and in the circumstances, the plaintiff Bank was effectively appointed to be (*a*) the custodian trustee of the settlement or (*b*) an ordinary trustee thereof jointly with the plaintiff A. W. Arning, or (*c*) whether the deed had no operation or effect in law.

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W. P. Spens K.C. and *H. S. Barker* for plaintiffs. Where there is a continuing trustee some of the difficulties under the Public Trustee Act, 1906, that were pointed out by the Court of Appeal in *Forster* v. *Williams Deacon's Bank Ld.* (1), do not exist, and the Court can construe the deed of appointment as effective to appoint the Bank custodian trustee only. Failing that, the document was wholly ineffective.

Roger Turnbull for the infant defendant.

Winterbotham and *R. A. Forrester* for other defendants.

FARWELL J. Under sub-s. 3 of s. 4 of the Public Trustee Act, 1906, a custodian trustee may be appointed by the person having power to appoint new trustees, and by virtue of that sub-section the custodian trustee may charge the fees therein mentioned, but no appointment of a managing trustee with power to charge can be made without the leave of the Court except in a case where the persons beneficially interested are sui juris and consent. In the recent case of *Forster* v. *Williams Deacon's Bank Ld.* (1), an attempt was made to avoid this difficulty by the appointment of a corporation as sole managing trustee and custodian trustee. It was thought that by such an appointment the corporation would be entitled to act as managing trustee and would get remuneration as custodian trustee. The Court of Appeal, however, held that no such appointment could be properly made. In the present case the Bank was appointed managing trustee, jointly with the continuing trustee in place of Mr. Hudson, who desired to retire, and custodian trustee. Having regard to the decision cited above such appointment was not effective to appoint the Bank in that dual capacity, and the question is what (if any) is the effect of such an appointment. It is said that the appointment of the Bank as managing trustee should be treated as effective and its appointment as custodian trustee ineffective and that accordingly it must act without remuneration. I cannot accept that contention. I see no ground upon which I can decide that either of the proposed

(1) [1935] Ch. 359.

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appointments alone is effective. The truth is that the appointment was never intended to operate except as an appointment of the Bank in the dual capacity, and since no such appointment is possible, the result must be that the whole appointment is ineffective, and that consequently Mr. Hudson was never discharged from the trusts.

Solicitors for all parties: *Cunliffe, Greg & Co., Manchester.*

P. J. B.

Distinguished. In re BARON VESTEY'S SETTLEMENT [1951] 1 Ch. 209

EVE J.
1935
Nov. 22; Dec. 10.

In re PEEL.
TATTERSALL *v.* PEEL.

[1935. P. 1342.]

Settlement—Covenant to pay annuity—Trust to pay or apply for "maintenance, education or benefit" of children of marriage as the trustees should think fit—No power to accumulate income.

On the marriage of O.P. and V.J., H.P. the father of the husband executed a deed whereby he covenanted with trustees that if the husband should die in his lifetime he would pay them an annuity of 1000*l.* in trust for V.J. so long as she should remain the widow of H.P. and thereafter upon trust to pay or apply the same for or towards the maintenance, education or benefit of any of the infant children of the marriage as the trustees might think fit.

The marriage was dissolved and the wife remarried. O.P. afterwards died in the lifetime of H.P. and the annuity became payable. There was one child of the marriage, who was an infant living with and being maintained by his mother:—

Held, that the deed created a trust to apply the whole annuity for the maintenance, education or benefit of the infant, the trustees having no power to accumulate all or any part of the income for the benefit of the infant until he should attain 21 years of age.

The word "benefit" is intended to cover expenditure incurred which does not strictly come under the heads either of "maintenance" or "education."

SUMMONS.

The facts are stated shortly in the headnote, and fully in the judgment of the learned judge.

Leonard Stone for the trustees, stated the question.

Hubert Rose for the defendant, Mrs. Drummond.

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There is an imperative trust to apply the income, or a substantial part thereof, for or towards the maintenance of the infant.

Mrs. Drummond was a party to the contract, which was ante-nuptial, and the benefit of the trust was part of her contract. She is entitled to have the trust strictly enforced, without reference to the question of her ability to support the infant and to have an adequate portion applied in his maintenance. *Stocken* v. *Stocken* (1), *Meacher* v. *Young* (2), *Wilson* v. *Turner*. (3) Lewin on Trusts, 13th ed., at p. 363.

The provision in s. 31, sub-s. 1 (v.) of the Trustee Act, 1935, does not here apply. The whole of the annuity of 1000*l.* is applicable for the benefit of the infant.

Leonard Stone for the trustees.

This is a power to apply the income for the purposes mentioned, and not a trust. The important words of the clause are " for the benefit," making it much wider than the objects of " maintenance and education."

If, however, it is a trust, the trustees have a discretion, and they consider that the best method of applying the income for the benefit of the infant is to accumulate it until he reaches his majority. The objects of maintenance, education or benefit are clearly alternative. [He referred, in addition to the cases previously cited, to *Ransome* v. *Burgess*. (4)]

S. M. Krusin for the infant defendant Hugh Jardine Ethelston Peel.

It is not suggested or contended on behalf of the infant that the whole of this annuity should be paid to the mother, only an adequate part, sufficient for his maintenance and education at Stowe, which costs some 350*l.* a year. The accumulation of money is not the application of it.

Cur. adv. vult.

Dec. 10. EVE J. On November 17, 1919, on the occasion of the intermarriage on the day following of the late Lieutenant

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(1) (1838) 4 My. & Cr. 95.
(2) (1834) 2 My. & K. 490.
(3) (1883) 22 Ch. D. 521, 525, 527.
(4) (1866) L. R. 3 Eq. 773.

Owen Peel with the respondent Violet Margaret Florence Drummond, then Violet Margaret Florence Jardine, Major Hugh Peel, the father of the bridegroom, as part of the arrangements entered into on the treaty for the said intended marriage, executed a deed of covenant with the said Violet Jardine that if the intended marriage should take place and if the said Owen Peel should die in the lifetime of Hugh Peel, then and if and so long as any issue of the intended marriage should be living, but not otherwise, the said Hugh Peel would during the remainder of his life pay to the trustees for the time being of the deed the clear yearly sum of 1000*l.* free of all deductions except income tax, as from the day of the death of the said Owen Peel, by equal quarterly payments on the usual quarter days. And it was thereby agreed and declared that the trustees should hold the said yearly sum payable under the covenant thereinbefore contained upon trust so long as the said Violet Jardine should remain the widow of the said Owen Peel, and there should be issue living of the intended marriage, to pay the same to the said Violet Jardine, and from and after her death or remarriage, " upon trust to pay or apply the same in manner thereinafter provided to or for the benefit of the children or child for the time being living of the said intended marriage and the children or child for the time being living of any deceased child of the said intended marriage and if more than one in equal shares per stirpes." And by cl. 3 of the deed, it was provided that the share of any child or more remote issue of the said intended marriage who should for the time being be an infant, and in the case of a female a spinster, should be applied by the trustees for or towards his or her maintenance, education, or benefit in such manner as the trustees should think fit, and so that the trustees might either themselves so apply the same or might pay the same to the parent or other the guardians or guardian for the time being of such infant for the purpose aforesaid without seeing to the application thereof.

The infant defendant is the only issue of the marriage. He was born on October 7, 1920. The marriage was dissolved on the wife's petition in September, 1927, and in 1929 she married again and is now the wife of Captain Drummond. Her former husband, Mr. Owen Peel, died on March 25, 1935, and as from that date Major Hugh Peel's covenant has come into operation.

On the dissolution of the marriage of the infant's parents, the custody of the infant was committed to his mother, and the cost of his maintenance and education first at a preparatory school and at the present time at Stowe, has been wholly defrayed by her. The infant in due course will succeed to property the income of which will be available for his enjoyment, but there may be delay in getting possession and duties will have to be provided for.

The trustees maintain that according to the true construction of the deed of covenant they are at liberty in the circumstances to accumulate the whole or any part of the said yearly sum and to hold such accumulations for the benefit of the infant after he has come of age. Mrs. Drummond takes a different view and contends that the deed is not to be construed as a mere power, but as creating a trust under which the trustees are bound to apply the fund for the purposes therein named. She admits that the manner in which the money is to be divided between the several purposes is left to the discretion of the trustees and that the Court will not control that discretion so long as it is exercised in good faith and in accordance with the trust.

In my opinion this latter view is the correct one. I think the trust is a compulsory one to apply the whole fund for the maintenance, education, and benefit of the infant or for any one or more of such purposes, and that the trustees have no power to retain any part of the fund for the purposes they suggest. Such a procedure would involve retention, not application, and be a breach of trust. I am not overlooking the words "and benefit" to which attention was directed in the argument in support of the construction for which the trustees contended. I do not see that they carry the weight attributed to them in support of that contention. In the bringing up of the infant there must occasionally

EVE J.
1935
PEEL, *In re.*
TATTERSALL *v.* PEEL.

arise doubts whether any particular expenditure comes under "maintenance" or "education," and the words in question relieve the trustees from the burden of solving such a question if they are satisfied that the expenditure is for his benefit.

Solicitors: *Rooper & Whately; Anstey & Co.*

H. L. L.

In re A DEBTOR.

[No. 11 of 1935.]

CLAUSON AND LUXMOORE JJ.
1935
Oct. 28, 29.

Bankruptcy—Deed of Assignment for benefit of creditors—Act of Bankruptcy—Petitioning creditors' participation in deed—Conduct at meeting of creditors—Acquiescence—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 5, *sub-s.* 3.

If in bankruptcy proceedings the execution of a deed of assignment is relied on by a creditor as an act of bankruptcy by a debtor and as a ground for the making of a receiving order, the Court may dismiss the petition and refuse to grant the petitioning creditor relief if it appears that he was himself a participator or sharer in bringing the deed into existence.

At a meeting of the creditors of a debtor, it was suggested that a deed of arrangement should be entered into by the debtor. One of the creditors, who was present throughout the proceedings, acquiesced in the proposal that his own name should be added to those to serve on the proposed committee of inspection, and in this sense he took part in the procedure which led up to the execution of the deed:—

Held, following the principles laid down in *Ex parte Stray* (1867) L. R. 2 Ch. 374, that the fact that the petitioning creditor himself took part in the proceedings which led up to the execution of the deed, constituted a sufficient cause within the meaning of s. 5, sub-s. 3, of the Bankruptcy Act, 1914, for dismissing the petition for a receiving order and that a receiving order made by the registrar of the county court must be discharged.

APPEAL of the debtors from a receiving order made on August 22, 1935, at the Oxfordshire County Court.

The following statement of facts, with certain modifications and additions, is taken from the judgment, dated August 22, 1935, of the registrar of the Oxfordshire County Court holden at Oxford.

On June 27, 1935, a meeting of the creditors of the debtors was held, and among those present was a Mr. T. H. Tombs, a member of the firm of T. H. Tombs & Son, plumbers, who were creditors for the sum of 733*l.* 12*s.* 2*d.* and in respect of which they had already, on June 19, 1935, issued a writ but—at the date of the meeting—had not obtained judgment.

A Mr. E. R. White, chartered accountant, was also present, and at the opening of the meeting Mr. Tombs proposed him as chairman and he was duly elected. Mr. White explained to those present at the meeting the difference between and respective advantages and disadvantages of a deed of arrangement and bankruptcy. A statement of affairs prepared by a firm of chartered accountants of Oxford was read to the meeting by a Mr. C. A. Jakeman, a member of the firm, and after questions had been asked, a resolution was proposed and seconded in the following terms: "That the debtors be called upon to execute a deed of assignment of their joint and separate estates to Mr. C. A. Jakeman, incorporated accountant, of etc. as trustee with a committee of inspection." Mr. Tombs proposed as an amendment that Mr. White be appointed a joint trustee with Mr. Jakeman. This was seconded and put to the meeting and lost, and the original resolution was then put to the meeting and carried. There was no evidence whether any one was given an opportunity to vote against the original resolution when put to the meeting. Mr. Tombs said that he did not vote against it, but, in my opinion, it may fairly be assumed that he did not vote for it. The following were then proposed as members of the committee of inspection—namely, Mr. T. H. Tombs, Mr. E. J. Hughes and Mr. E. Basson, and they were appointed as such members. It was stated in evidence that Mr. White said: "If there is to be a committee of inspection, Mr. Tombs as the largest creditor should be on it." There is no evidence to show that Mr. Tombs made any objection to his name being put forward as a member of the committee of inspection. At the conclusion of the meeting, Mr. Jakeman spoke to Mr. Tombs as he was about to leave the room and asked him to sign the deed. I have no evidence whether before this the deed had been executed by the debtors or not. Mr. Jakeman's evidence was that Mr. Tombs replied that he was not going to sign the deed then but would take further advice. Mr. Tombs' evidence was that his reply was: "I haven't signed the deed, neither do I intend to," and that he may have mentioned at a later time something about taking further advice.

Two days after the meeting, Mr. Tombs went away for a holiday. On July 17 Mr. Jakeman telephoned Mr. Tombs, who had then returned home, and asked him to attend a meeting of the committee of inspection, and Mr. Tombs' reply was that he was not coming, as he did not regard himself as a member of the committee.

At the hearing of the petition before me, Mr. Tombs, in a reply to a question put by me whether he had any preference as between a deed of assignment and bankruptcy, said that he preferred bankruptcy in any event. On July 31, 1935, judgment was signed in default of appearance upon the writ issued by the creditors, Messrs. Tombs & Son, against the debtors, and on August 11 a bankruptcy petition was filed by the creditors alleging as the act of bankruptcy the execution by the debtors of the deed of assignment on June 27, 1935. This deed has been duly registered and the requisite number of consents has been obtained and as a deed of assignment it is valid. It has never been signed nor has any assent been given to the deed by the creditors, Messrs. T. H. Tombs & Son. Notice of opposition to the making of receiving orders has been given on the ground that the petitioning creditors are estopped from relying on the act of bankruptcy named in the petition and the point for decision in this case is whether by his conduct at the meeting of creditors, Mr. T. H. Tombs, as agent for the petitioning creditors, must be taken to have acquiesced in or assented or been privy to the deed. [The registrar having commented on the cases cited in argument and the evidence, continued:] In my opinion, Messrs. T. H. Tombs & Son have never assented to the deed and are not bound by it, and could have founded a bankruptcy petition had they wished on some other act of bankruptcy than that now alleged.

On the question whether the petitioning creditors are estopped in other respects from relying on the deed of assignment as an act of bankruptcy, I find, looking at all the circumstances, that the objectors have not discharged the onus placed upon them of proving that the petitioning creditors intentionally took advantage of the deed having been executed, or were otherwise privy to or acquiesced in the deed, and that therefore a receiving order can be made.

From this decision the debtors appealed to the Divisional Court in Bankruptcy.

C. Tindale Davis for the appellants. The deed of assignment cannot be relied on under the circumstances leading up to its execution as an act of bankruptcy: *In re Brindley, Ex parte Taylor, Sons & Co.* (1); *In re Mills* (2); and see also *Ex parte Stray.* (3)

P. A. Devlin for the respondents. Creditors need not express their dissent to a deed of assignment and may consider their position: *In re Carr.* (4) Here the facts fall within the principle of that case. See *In re Michael* (5) for Vaughan Williams J.'s remarks. Being "privy to a deed" requires more than mere knowledge. On the question of being a participator and sharer in the execution of the deed, compare *In re Jones Brothers.* (6) To be privy to a deed some advantage must be got out of it, and the onus must rest on the debtor.

C. Tindale Davis in reply cited *In re a Debtor* (7); *In re Sunderland.* (8)

CLAUSON J. This is an appeal from the decision of the registrar of the county court of Oxfordshire holden at Oxford. The registrar made a receiving order on August 22, 1935, having held that there was nothing to preclude the petitioning creditors from relying upon the act of bankruptcy which they alleged—namely, that the two debtors had executed a deed of assignment. The debtors now ask that we should reverse that order and that the petition should be dismissed

(1) [1906] 1 K. B. 377.
(2) [1906] 1 K. B. 389.
(3) L. R. 2 Ch. 374.
(4) (1901) 85 L. T. 552.
(5) (1891) 8 Morr. 305, 309.
(6) [1912] 3 K. B. 234.
(7) [1924] B. & C. R. 105.
(8) [1911] 2 K. B. 658.

on the ground that, notwithstanding the execution of the deed, the petitioning creditors ought not to be allowed to rely upon that execution as giving them the right to obtain relief in bankruptcy against the debtors.

The facts are contained in a very careful judgment by the registrar, and I do not wish to criticize his presentation of them, but he appears to me to have misdirected himself in point of law. He has taken the view that the objectors—I am using his own language—did not discharge the onus placed upon them of proving that the petitioning creditors intentionally took advantage of the deed having been executed or were otherwise privy to or acquiesced in the deed. He therefore held that a receiving order should be made, while on the facts (as he finds them) it appears to me that the petitioning creditors were sufficiently privy if not to the deed, at all events to all the circumstances which led up to its execution, so as to preclude them from relying upon its execution as being an act of bankruptcy.

It will be convenient, before I refer briefly to the facts that I should read a passage from the judgment of Lord Cairns L.J. in *Ex parte Stray.* (1) Lord Cairns says: "It is well settled by a series of authorities, of which the case of *Ex parte Alsop* (2) may be mentioned as the last, that a creditor, who is a party or privy to a deed of the description mentioned in the statute, or who has acted in any way which would be equivalent to an assent, recognition, or approval of the deed, cannot allege that the execution of the deed is an act of bankruptcy. I apprehend that the principle upon which those cases (the authority of which cannot now be questioned) have gone is this, that inasmuch as, under the statute, the petitioning creditor is obliged to allege that the act in question is a fraudulent act, any person who has been a participator or sharer in the fraud cannot be heard to claim any benefit or advantage from the act." Now assuming that the petitioning creditor has been a participator or sharer in what Lord Cairns speaks of as the fraud—which I understand means the bringing into being of the deed of arrangement—the difficulty in which he is, when he relies upon the execution of that deed as a ground for a receiving order, may be put in one of two ways. Before the court can make a receiving order, it must be satisfied with proof of the act of bankruptcy; and it may be that the right way to put the matter is this, that when the creditor, who has been such a participator, comes forward and asks the court to accept his affidavit that the deed has been executed, he is in this difficulty, that the court is bound to say to him, that it is contrary to principle that a person who has been a participator in what the legislature regards as a fraud should, in order to obtain relief for himself, set up that somebody else has been guilty of the very fraud in which he participated. Mr. Tindale Davis for the appellants suggested that this was the correct way of putting it. I should put the matter differently, and rely on s. 5, sub-s. 3, of the Bankruptcy Act, 1914 (1), which enables the Court to dismiss the petition if it is satisfied that for some sufficient cause no order ought to be made, and hold that having regard to the well-settled practice during the last seventy years since the case of *Ex parte Stray* (2), it is sufficient cause for refusing to make an order granting the petitioning creditor relief on the ground of the deed having been executed, that it appears that the petitioning creditor was himself a participator or sharer in bringing the deed into existence.

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(1) L. R. 2 Ch. 374, 378.

(2) (1859) 1 De G. F. & J. 289.

That being my view of the law, I now turn to the facts. It appears that at a meeting of creditors called to consider the position the project was put forward of having a deed of arrangement. One of the petitioning creditors, Mr. T. H. Tombs, suggested that a nominee of his own should be a joint-trustee with the trustee who was being suggested on behalf of other persons interested. That proposal did not receive acceptance from the other creditors and was dropped.

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(1) Bankruptcy Act, 1914, s. 5, sub-s. 3: "If the court is not satisfied with the proof of the petitioning creditors debt, or of the act of bankruptcy, or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the court may dismiss the petition."

(2) L. R. 2 Ch. 374, 378.

But the more important and what seems to me to be the crucial fact is this. The question arose who should serve on the committee of inspection. The name of Mr. T. H. Tombs was proposed, and, in his presence and quite plainly with his acquiescence, it was resolved that the committee should consist of certain persons, one of whom was himself. He did not in fact sign the deed; but in my view that does not matter, for it is impossible to hold that he did not take a part in the procedure which led up to the execution of the deed. It was in fact executed by the debtors practically simultaneously; it is dated the same day and it was executed as the result of what occurred at the meeting.

Now where the registrar has gone wrong seems to be this: after stating all these facts he holds that this petitioning creditor is not precluded from relying on the execution of the deed as an act of bankruptcy unless he has taken advantage of the deed having been executed, though it is true that the registrar adds the words: "or [was] otherwise privy to or acquiesced in the deed." He seems to have thought that participation in the proceedings was not enough, that there must be something to show that some kind of advantage was taken of the deed by the petitioning creditor.

It is no doubt the case that in *Ex parte Stray* (1) there were facts upon which the judges might have relied as showing that the petitioning creditor had in fact taken advantage of the execution of the deed and so on that ground would be precluded from relying upon its execution. But in my view we in this Court are bound to follow the statement of the law which I have read from *Ex parte Stray*. (1) This statement has been a guide to the court ever since, and in my view we ought to consider it a sufficient cause for refusing to make the receiving order that this petitioning creditor—relying as he does upon the execution of the deed as an act of bankruptcy—took part in the proceedings which led up to it. It is on that ground that I feel unable to agree with the judgment of the registrar, and in my view we must allow

(1) L. R. 2 Ch. 374.

the appeal and discharge the receiving order, with the usual result as to costs.

LUXMOORE J. I find myself in complete agreement with what has fallen from my brother Clauson.

Solicitors: *Church, Adams, Tatham & Co., for Challenor & Son, Oxford; Clifford-Turner & Co., for Linnell & Murphy, Oxford.*

A. R. T.

LUXMOORE J.

1935

March 5, 6, 7, 8, 12, 13, 14, 22.

WATH-UPON-DEARNE URBAN DISTRICT COUNCIL *v.* JOHN BROWN AND COMPANY, LIMITED.

[1930. W. 2075.]

Mines—Waterworks—Reservoir—Inclosure Act—Lord of Manor's rights to minerals preserved subject to compensation for damage to surface —Right of support passing by conveyance to Local Authority— Wath-upon-Dearne Inclosure Act, 1810 (50 *Geo.* 3, *c. xlix.*)— *Railways Clauses Consolidation Act,* 1845 (8 & 9 *Vict. c.* 20), *ss.* 78, 79—*Waterworks Clauses Act,* 1847 (10 & 11 *Vict. c.* 17), *ss.* 18 *to* 27—*Public Health Act* 1875 (*Support of Sewers*) *Amendment Act,* 1883 (46 & 47 *Vict. c.* 37), *s.* 3, *sub-s.* 2—*Wath-upon-Dearne Urban District Council* (*Water*) *Act,* 1898 (61 & 62 *Vict. c. ccxxxviii.*).

The plaintiff council, being the statutory undertakers for the supply of water to the urban district of Wath-upon-Dearne, purchased by agreement in 1901, from trustees for sale under a settlement, certain land in Wath-upon-Dearne which had been allotted to the vendors' predecessors in title in 1810 under an Inclosure Act. This allotment was subject to the reservation to the lord of the manor of Wath-upon-Dearne of coal and other minerals, with power to work the same upon making compensation to the allotment owners for damage to the surface of the lands caused by working.

Shortly after the purchase, the plaintiffs erected two reservoirs and three filter beds on the land purchased. The defendant company were lessees from the lord of the manor of a seam of coal lying under and adjacent to the plaintiffs' land. In 1911 the defendant company, in pursuance of the Waterworks Clauses Act, 1847, and the Public Health Act 1875 (Support of Sewers) Amendment Act, 1883, gave notice to the plaintiffs of their intention to work the coal under and within forty yards of the plaintiffs' waterworks. This notice was duly acknowledged, but no counter-notice was given by the plaintiffs of willingness to treat or to make compensation for or of their intention to prevent or interfere with the working of the coal either within or outside the forty yards area.

In 1914, the plaintiffs purchased from the same vendors further lands adjoining the land bought in 1901 and subject to the same reservation of minerals to the lord of the manor of Wath-upon-Dearne. The plaintiffs constructed on this land two further reservoirs, two more filter beds and other works.

Damage to one of the reservoirs having appeared between October, 1926, and January 21, 1929, caused, as was alleged, by the working of the adjacent and subjacent minerals by the defendants, the plaintiffs had the damage repaired. In 1930 a further notice of intention to work minerals near another part of the plaintiffs' lands and reservoirs was served on the plaintiffs by the defendants, but again no counter-notice was given by the plaintiffs.

The plaintiffs thereupon issued a writ claiming an injunction and damages or compensation. His Lordship having held on the evidence that the damage to the waterworks was caused by subsidence of the surface directly due to the working of the minerals by the defendants and that the surface would have been damaged by subsidence if the waterworks had not been constructed on it, the question arose whether the vendors to the plaintiffs in 1901 and 1914, when they conveyed the land, had any right of support for the surface of those plots from the subjacent minerals and adjacent land and minerals, and if so, whether this right passed to the plaintiffs:—

Held, (1.) that on the true construction of the Inclosure Act, 1810, the common law right of support was not excluded by necessary implication and that the vendors to the plaintiffs had a common law right to have the surface supported by the subjacent minerals and adjacent land and minerals; and (2.), that this right passed to the plaintiffs by the conveyances of 1901 and 1914, and that the defendant company was not entitled to ignore this right although the plaintiffs failed to give any counter-notice under ss. 22 and 23 of the Waterworks Clauses Act, 1847. Further, that there was nothing in the Public Health Act 1875 (Support of Sewers) Amendment Act, 1883, s. 3, sub-s. 2 (which gives the local authority an option to extend their counter-notice to minerals outside the forty yards area), to deprive the local authority of the rights they possessed outside the forty yards area, if the option conferred by that section was not exercised.

The principles laid down in *New Moss Colliery, Ld.* v. *Manchester Corporation* [1908] A. C. 117 applied.

Pountney v. *Clayton* (1883) 11 Q. B. D. 820 discussed.

ACTION.

The plaintiffs, who were the owners in fee simple of lands in Wath-upon-Dearne, in the county of York, and of certain

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water reservoirs and filter beds constructed thereon and by means of which they supplied water to the urban district of Wath-upon-Dearne, by these proceedings sought an injunction to restrain the defendants, as lessees, from working mines and minerals lying under or near the plaintiffs' land in such a manner as to cause injury or damage to the plaintiffs' lands, reservoirs, and filter beds; they further claimed damages or compensation for the injury caused by the defendants working the said mines and minerals.

The facts, which are summarized in the headnote, are fully set out below in the judgment of the learned judge.

W. P. Spens K.C. and *Russell Gilbert* for the plaintiffs. Under the conveyances to the plaintiff council in 1901 and 1914 respectively, the vendors to the council, the plaintiffs' predecessors in title, had a right at common law to have the surface of the land which they conveyed supported by vertical and lateral support by the subjacent minerals and adjacent land and minerals. These rights were not excluded by any implication by the Wath-upon-Dearne Inclosure Act, 1810. They passed to the plaintiff council and gave them a right to vertical and lateral support: see *New Moss Colliery, Ld.* v. *Manchester Corporation* (1), which governs this case. The fact that no counter-notice was given by the plaintiffs to the defendants does not take away from them these rights of support at common law.

At common law the surface owner has a right of proper support: *Davis* v. *Treharne* (2); see, too, *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.* (3) Although under the Inclosure Act, 1810, the lord of the manor was given wide powers of working the coal, these did not give him the right to let down the surface: see *Butterley Co.* v. *New Hucknall Colliery Co.* (4) Compare *Welldon* v. *Butterley Co.* (5), but see *Warwickshire Coal Co.* v. *Coventry Corporation.* (6)

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(1) [1908] A. C. 117.
(2) (1881) 6 App. Cas. 460.
(3) [1906] A. C. 305.
(4) [1910] A. C. 381.
(5) [1920] 1 Ch. 130.
(6) [1934] Ch. 488.

The plaintiff council were in a position to take over the right of their vendors to vertical and lateral support. The fact that the plaintiffs are statutory undertakers does not matter. The provisions of ss. 18 to 27 of the Waterworks Clauses Act, 1847, "the Code," do not, it is submitted, assist the defendants, even though no wilful damage was caused by them under s. 23: see *New Moss Colliery, Ld.* v. *Manchester Corporation.* (1) Reference may usefully be made to *In re Corporation of Dudley* (2), Lumley on the Public Health Acts; 10th ed., p. 2183.

F. K. Archer K.C. and *H. V. Rabagliati* for the defendants. The question is, what is the effect of "the Code," in a case like the one now before the Court? The case of *New Moss Colliery, Ld.* v. *Manchester Corporation* (1) does not govern this case, and the question there decided has nothing to do with the point here.

There are many dicta in that case, but they are pure dicta and there is no working formula.

It is submitted that the following propositions apply. First, the plaintiffs never acquired any common law or other right of support from the minerals, and the fact that the minerals were severed in title from the rest of the land makes no difference. Secondly, the mineowners had under the Inclosure Act, 1810, a right to let down the surface subject to making compensation. This compensation cannot be extended to injury to a statutory undertaking, for that would be in substance conferring a different right on a statutory successor of the allottee—a common law right of support for a statutory undertaking.

The plaintiffs are entirely the creatures of statute and their rights and duties must therefore be statutory. A conveyance to them in fee simple must be construed and have effect according to the relevant statutes. See *Manchester Corporation* v. *New Moss Colliery, Ld.* (3), when it was before Farwell J. and the learned judge's remarks. The relevant statutes are the Public Health Act, 1875, under which the plaintiffs are potential water undertakers, the Public Health Act 1875 (Support of Sewers) Amendment Act, 1883, the plaintiffs' private Act of 1898, the Inclosure Act of 1810, and the Waterworks Clauses Act, 1847.

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(1) [1908] A. C. 117.
(2) (1881) 8 Q. B. D. 86.
(3) [1906] 1 Ch. 278, 294, 295, 297.

By their conveyances in 1901 and 1914, the plaintiffs purchased land for the water undertaking. Though the deeds do not state this, yet, as the creatures of statute, the plaintiffs had no power to acquire the land for waterworks except under their Act of 1898. They therefore obtained a statutory estate in what they purchased. But for a special statutory provision, the plaintiffs would or might have had no power to buy the surface without the minerals. By s. 18 of the Waterworks Clauses Act, 1847, the undertakers, that is the plaintiffs, are not to be entitled to any coal mines (with the slight exception therein mentioned of such parts as shall be necessary to be dug or carried away or used in the construction of the waterworks) unless they shall have been expressly purchased. All other minerals were excepted from the conveyances of 1901 and 1914, but they were not true exceptions, because the plaintiffs' vendors did not own the minerals. The plaintiffs could under the 1847 Act have taken a conveyance of the land and a conveyance of the minerals from the separate owner of them, or they could have taken a conveyance of the land except the minerals and have come to an agreement under s. 22 of the Act: *London and North Western Ry. Co.* v. *Howley Park Coal and Cannel Co.* (1) The plaintiffs never gave any counter-notice: see *Midland Railway Co.* v. *Robinson.* (2) The plaintiffs never attempted either to buy the minerals or to put an embargo on the working of them; the result being that they clearly elected to take a conveyance of the land without the minerals. Therefore they only obtained such statutory rights as were conferred on them as regards the minerals: see s. 22 of the Waterworks Clauses Act, 1847, and s. 3, sub-s. 2, of the Public Health Act 1875 (Support of Sewers) Amendment Act, 1883. It is well settled that this statutory right is inconsistent with the common law right of support which the plaintiffs would

(1) [1911] 2 Ch. 97, 113. (2) (1887) 37 Ch. D. 386, 402, 405.

ordinarily obtain from a vendor owning both surface and minerals. This common law right is therefore excluded. Indeed it has been clearly pointed out that this common law right was excluded whether the vendor had both surface and minerals or only the surface with a right of support attached to it: see *Great Western Railway Co.* v. *Bennett* (1); *Pountney* v. *Clayton* (2); *London and North Western Railway Co.* v. *Howley Park Coal and Cannel Co.* (3); *Consett Waterworks Co.* v. *Ritson* (4); *New Moss Colliery, Ld.* v. *Manchester Corporation.* (5) In this last case the only claim was to keep inviolate Taylor's land which was bought with the minerals. As regards that land the corporation did not exercise the option and therefore did not get the special statutory right, which excludes the common law right of support; and the latter remained, never having been affected by "the Code" at all.

The plaintiffs never availed themselves of their statutory right by giving a counter-notice, but their abstention did not abrogate the statutory right in any way nor the fact that the mines have now been worked and damage done. Their inaction cannot vest in the plaintiffs the common law right of support for which the statutory right was a substitute: see Lord Atkinson's remarks in the *New Moss* case (5) on the words in s. 23 of the Waterworks Clauses Act, 1847, "as if this Act and the special Act had not been passed." These words do not affect this point. They are difficult to construe, and, it is submitted, may only mean that as regards any working which takes place before a counter-notice is given, the mineowners can work as if there never had been any statutory restriction on them other than that contained in the same section. In the *New Moss* case (5), it was not necessary to construe those words. There there was no abrogation and restoration of the rights annexed to Taylor's land; those rights remained throughout. Therefore the numerous dicta in that case are of no assistance in a case like the one now before the Court.

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(1) (1867) L. R. 2 H. L. 27, 38.

(2) 11 Q. B. D. 820, 840, 841.

(3) [1911] 2 Ch. 97, 115.

(4) (1889) 22 Q. B. D. 318.

(5) [1908] A. C. 117, 121, 125.

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If in some form or other the Court seeks to uphold some kind of right of the plaintiffs as successors in title of an allottee under the Inclosure Act, it may be an objection that the plaintiffs are seeking, at the expense of the mineowners, to rely on a common law right of support for their statutory undertaking which the allottee could not give them. Compare a very recent case : *Warwickshire Coal Co.* v. *Coventry Corporation.* (1) As against the allottee, the mineowners had by virtue of the Act a right to work subject only to making compensation, that is ordinary compensation, not in respect of works and buildings set up under statutory powers which never could have been contemplated by the parties to the Inclosure Act. The plaintiffs are not therefore setting up the allottees' right but a substantially different right. A mere right to compensation cannot be relied on by the plaintiffs because they are statutory undertakers within "the Code," and it would be ultra vires for them to acquire a right, the exercisability of which presupposes the destruction of or serious damage to the reservoir : *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.* (2) and Maugham L.J.'s remarks in *Warwickshire Coal Co.* v. *Coventry Corporation.* (1) See also *Butterley Co.* v. *New Hucknall Colliery Co.* (3) ; *Beard* v. *Moira Colliery Co.* (4) ; *Davies* v. *Powell Duffryn Steam Coal Co.* (5) ; *Welldon* v. *Butterley Co.* (6)

On principle the true position is that if the undertakers only buy the surface they get no support at all from any minerals within the area. If they buy any minerals they only pay for loss of profit, so that if they can show that, as against a mineowner, his profits will be less because he is bound to give support to a neighbour's land, they will pay him less.

Regarding the obligation to give compensation contained in the clause in the Inclosure Act, 1810, this is similar to covenants in mineral leases, and would cover damage to buildings erected after the covenant has been entered into: see MacSwinney on Mines, 5th ed., p. 197, and *Berkley* v. *Shafto* (1); *Barr* v. *Baird & Co.* (2); *Neill's Trustees* v. *William Dixon Ld.* (3)

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(1) [1934] Ch. 488, 516.
(2) [1906] A. C. 305.
(3) [1909] 1 Ch. 37.
(4) [1915] 1 Ch. 257.
(5) [1917] 1 Ch. 488.
(6) [1920] 1 Ch. 130.

W. P. Spens K.C. in reply. On the question of compensation under the Inclosure Act, 1810, this may cover injury to buildings erected after the taking of the underlying coal has been completed: see *Aynsley* v. *Bedlington Coal Co.* (4); *Love* v. *Bell* (5) which is relied on. [He referred also to *Butterley Co.* v. *New Hucknall Colliery Co.* (6); *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.* (7)] The case of *Pountney* v. *Clayton* (8) depends largely on the construction of the Railways Clauses Consolidation Act, 1845, and does not govern this case. The plaintiffs have a common law right of lateral and vertical support for their reservoir, and the fact that they are statutory undertakers makes no difference. The principles of *New Moss Colliery, Ld.* v. *Manchester Corporation* (9) apply.

Cur. adv. vult.

1935. March 22. LUXMOORE J. The plaintiff council is the statutory undertaker for the supply of water for the Wath-upon-Dearne Urban District, and in that capacity is the owner of certain surface lands on which waterworks with the appropriate reservoirs and filter beds have been constructed.

The defendant company are the lessees of a seam of coal lying under and adjacent to the council's waterworks. The council claims that the defendant company by working the seam of coal have caused the council's land to subside and that substantial damage has thereby resulted, and further claim an injunction restraining the defendant company, "their servants, workmen and agents from working the minerals lying under or near the said lands of the plaintiffs in such a manner as to cause injury or damage to the plaintiffs' said lands, reservoirs and filter beds or any of them"; it also claims damages or compensation for the damage or injury to its works, and ancillary relief.

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(1) (1863) 15 C. B. (N. S.) 79.

(2) (1904) 6 F. 524.

(3) (1880) 7 R. 741.

(4) (1918) 87 L. J. (K. B.) 1031, 037.

(5) (1884) 9 App. Cas. 286, 292.

(6) [1910] A. C. 381.

(7) [1906] A. C. 305.

(8) 11 Q. B. D. 820.

(9) [1908] A. C. 117.

The defendant company alleges that the council has no ground of complaint against it, because no subsidence has been caused by its working. It further alleges that, if subsidence has in fact been caused by that working, the defendant company is not liable, because the council, having received due notice of the defendant company's intention to work its coal under the land within forty yards of the plaintiffs' waterworks in accordance with the provisions of the Waterworks Clauses Act, 1847, the Public Health Act 1875 (Support of Sewers) Amendment Act, 1883, took no steps to acquire the coal or any part of it, or to make compensation for it, or to prevent or interfere with the working of the coal.

To this the council replies that it does not rely on any statutory right, but on the common law right to support which was vested in the vendors to the council at the date of the sale and conveyance to it in respect of the land sold and conveyed.

In answer to this contention, the defendant company says, first, that the vendors had no right of support at common law, and secondly, if the vendors had any such right, it did not pass to the council by the conveyance of the land in question; and that the council's only right of support is that afforded by the provisions of the Acts of 1847 and 1883, to which I have referred.

The solution of the several legal problems raised is difficult, and counsel on each side referred to a number of authorities. There is little dispute of fact. The facts material are as follows: For some period before 1898 and down to the passing of the Wath-upon-Dearne Urban District Council (Water) Act, 1898, the area comprised in that district was supplied with water by the West Melton Waterworks Company. The 1898 Act authorized the taking over of the existing works of the last named company, and constituted the council the statutory undertaker for the supply of water for the district. It incorporated, among other general Acts, the Waterworks Clauses Act, 1847, the Waterworks Clauses Act, 1863, and the Public Health Act 1875 (Support of Sewers) Amendment Act, 1883. By s. 15, the council was authorized to purchase by agreement additional lands. It is in the following terms: "The Council may for any of the purposes of their water undertaking purchase by agreement any lands not exceeding one hundred acres but the Council shall not create or permit the creation or continuance of any nuisance on any such lands or use such lands for any building except offices and dwellings for persons in their employ and such buildings and works as may be incident to or connected with their waterworks." The Act does not confer on the council any authority to purchase compulsorily. Sect. 20 confers on the council the necessary powers to maintain the waterworks. On June 4, 1901, the council purchased 4840 square yards of land in the highest part of Wath Wood. The vendors were the trustees for sale of a settlement made on the marriage of a Mr. R. C. Otter. This land had with other land been allotted to the vendors' predecessors in title under an Act passed in the year 1810 intituled "An Act for inclosing lands in the Township of Wath-upon-Dearne." The allotment was made subject to a reservation to the then Earl Fitzwilliam as Lord of the Manors of Wath-upon-Dearne and Thornhill Hall of any mines of coal and other minerals in or under the allotted lands. I will refer to this Act with more particularity later. The conveyance of 1901 was expressed to be subject to the exception and reservation of minerals, and the power to work the same "granted to the Lord of the Manor by the Inclosure Award for the Parish of Wath-upon-Dearne," meaning the 1810 Inclosure Act. By the end of the year 1903, the council had constructed two reservoirs and three filter beds on the land conveyed to it by the conveyance of June 4, 1901. Before the land was purchased, coal had been worked under it. There are a number of seams of coal under the land in question and throughout the district. One of these seams is known as the Barnsley seam. This lies at a depth of some two hundred and sixty-four yards below the surface of the land comprised in the 1901 conveyance Another of the seams is known as the Parkgate seam and lies at a depth of about seven hundred and eighty yards below the surface, and five hundred and five yards below the Barnsley seam. The Barnsley seam has substantially been worked out under the land comprised in the 1901 conveyance and in its immediate neighbourhood. The working took place mainly between the years 1881 and 1885; and any subsidence resulting from it occurred long before any date material to be considered in this action, and it was admitted that no further subsidence was likely to occur in respect of the old workings, provided these were not disturbed by the subsequent working of any of the seams below the Barnsley seam.

On January 21, 1911, the defendant company gave to the council a notice of its intention to work the coal under and within a distance of forty yards from the plaintiff council's waterworks. This notice was given under the provisions of the Waterworks Clauses Act, 1847, and the Public Health Act 1875 (Support of Sewers) Amendment Act, 1883. The receipt of this notice was duly acknowledged, but the council did not then, or at any later date, give to the defendant company any counter-notice of willingness to treat or to make compensation for or of its intention to prevent or interfere with the working of any underlying or surrounding mines or minerals, whether within or outside the forty yards area. At the date of the notice the defendant company had not worked any of the coal within a distance of some two hundred and fifty yards from the council's waterworks.

On October 5, 1914, the council purchased from the then trustees of the same settlement a piece of land adjoining the land bought in 1901. This land comprised an area of 3888 square yards and was conveyed subject to a similar exception and reservation of the mines and minerals to that contained in the 1901 conveyance. It formed part of the land allotted to the vendors' predecessors in title under the 1810 Allotment Act, and was subject to the reservation of mines and minerals in favour of Earl Fitzwilliam as Lord of the Manors to which

I have already referred. By the end of the year 1915 the council had constructed and completed two further reservoirs, two new filter beds, an engine-house and water-tower on this land.

The defendant company, after the expiration of the statutory period of thirty days from the giving of the notice, began to work the Parkgate seam, and by September, 1928, had reached a point within the forty yards area. No sign of trouble was manifested at the plaintiff council's waterworks until October, 1926. At that date, while one of the new reservoirs constructed in 1915 was being cleaned, fine vertical cracks were noticed in the angles of the east and west walls of that reservoir and some slight cracks were observed in its floor. These cracks were made good and for a time there was no further trouble; but on October 12, 1928, it was discovered that a large quantity of clear water was collecting on the surface of the land which is adjacent to and on the south-west side of the council's waterworks. Examination of the waterworks disclosed the fact that water was escaping from the base of one of the filters at the rate of fifty-seven thousand gallons a day, and serious cracks were found in its west wall and floor. These cracks were dealt with temporarily.

On January 16, 1929, it was noticed that the level of the water in the new reservoir was dropping at a rate out of all expected proportions to the service then being given, and in consequence the two filters were tested. It was found that there were serious cracks in both filters, and that water was being lost at the rate of over sixty-five thousand gallons per day. On January 20 and 21, 1929, the reservoir was again tested, and the cracks were found to be worse than they were on January 16. Letters were written to the defendant company and to Messrs. Stewarts & Lloyds, Ld., who were the lessees of the Barnsley seam. The plaintiff council repaired its works by lining them with a bitumastic sheeting, so that in effect there was a system of tanks constructed inside the original filters and reservoirs. In the result there has been no further loss of water, and it is apprehended that—even if any further cracks should develop in the filters or reservoirs—no water is likely to escape. The total cost of the work done to remedy the damage was stated to be 1349*l.* 18*s.* 7*d.*

On February 18, 1930, the defendant company gave to the council a further notice, which was expressed to be in confirmation and continuation of the notice previously given to the council in 1911. In it the defendant company is described as the owner, lessee or occupier of mines or seams of coal, including the Parkgate seam, under and near the council's waterworks, and under the lands within the distance of forty yards therefrom. The notice stated that the defendant company was desirous of working this seam of coal at the expiration of thirty days from the service of the notice. No counter-notice was served on behalf of the plaintiff council under the provisions of the Waterworks Clauses Act, 1847, and the Public Health Act 1875 (Support of Sewers) Amendment Act, 1883, or either of them.

On May 30, 1930, the writ in this action was issued against the defendant company and Messrs. Stewarts & Lloyds, Ld. On July 26, 1930, the plaintiff council gave to Messrs. Stewarts & Lloyds, Ld., notice of discontinuance, and since that date the action has proceeded against the defendant company alone. I am satisfied from the evidence that the damage to the waterworks was caused by subsidence of the surface directly due to the working of the Parkgate seam by the defendant company, and that the surface would have been damaged by subsidence if the waterworks had not been constructed on it.

The question which I have to determine is whether the plaintiff council has any legal cause of complaint against the defendant company. To answer the question a number of other questions arise or may arise for solution. Some of these are of considerable difficulty. I propose to formulate the questions which seem to me to require or may require consideration, and to state them in what appears to me to be their logical sequence. (1.) Had the vendors to the council, at the respective dates in 1901 and 1914, when they conveyed to it the two plots of land already mentioned, any right of support for the surface of these plots from the subjacent minerals and adjacent land and minerals? (2.) If the answer to this question is in the affirmative, did such right pass to the council? (3.) If the answer to the first question is in the negative, had the vendors at the same dates any right to receive compensation for damage which might thereafter be suffered in respect of the land in question by reason of the working of the mines and minerals? (4.) If the answer to the third question is in the affirmative, did that right pass to the council? (5.) Is the council entitled to any, and what, relief, having regard to the answers to the preceding questions?

The answer to the first question necessitates a careful consideration of the Wath-upon-Dearne Inclosure Act of 1810. In construing the Act, it is necessary to bear in mind the rules laid down in the cases which have been decided with reference to other Inclosure Acts of a similar character. These rules were summarized by Lord Loreburn and Lord Macnaghten in *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.* (1), where Lord Loreburn L.C. said: "Whenever the minerals belong to one person and the surface to another, the law presumes that the surface owner has a right to support, unless the language of the instrument regulating their rights, or other evidence, clearly shews the contrary. In order to exclude a right of support, the language used must unequivocally convey that intention, either by express words or by necessary implication. For the same presumption in favour of a right of support which regulates the rights of parties in the absence of an instrument defining them will apply also in construing the instrument when it is produced. If the introduction of a clause to the effect that the mines must be worked so as not to let down the surface would not create an inconsistency with the actual clauses of the instrument, then it means that the surface cannot be let down. Illustrations are numerous in the reports. Words, however wide, that merely authorise the getting of all the minerals, have been held not to authorise so getting them as to let down the surface. Where power is given to get the

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(1) [1906] A. C. 305, 309, 313.

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minerals on paying compensation for damage done to the surface, the Court will still scrutinise the compensation clause. Are there any rights belonging to the mine owner on the surface (such as a right of making roads) to which the compensation clause may refer? If the compensation clause is capable of being satisfied by reference to acts done *on* the surface, then, though it may be wide enough to cover also damage done *to* the surface by taking away the support, still it must be confined to damage done *on* the surface, and the inference that support may be taken away on payment of compensation will not be drawn. Again, Courts have asked whether the compensation is manifestly inadequate for such an injury as letting down the surface, and have commented upon the absence of any provision for compensation. Either of these circumstances has supplied judges with a reason for so cutting down wide language in a grant of minerals as to imply a condition that the surface shall be supported. The process of reasoning in such cases seems to be that parties must not be supposed to have intended what would be unreasonable and unjust. I think that in each of them a clause providing for a continuance of support would not have been inconsistent with the actual clauses." Then Lord Macnaghten in the same case said: "The result seems to be that in all cases where there has been a severance in title and the upper and the lower strata are in different hands, the surface owner is entitled of common right to support for his property in its natural position and in its natural condition without interference or disturbance by or in consequence of mining operations, unless such interference or disturbance is authorised by the instrument of severance either in express terms or by necessary implication. This presumption in favour of one of the ordinary and most necessary rights of property holds good whether the instrument of severance is a lease, or a deed of grant or reservation, or an inclosure Act or award. To exclude the presumption it is not enough that mining rights have been reserved or granted in the largest terms imaginable, or that powers and privileges usually found in mining grants are conferred without stint, or that compensation is provided in measure adequate or more than adequate to cover any damage likely to be occasioned by the exercise of those powers and privileges. Nor is it enough, in the case of a lease, that the lessee is bound to work out the minerals or to work the minerals in a prescribed manner, or, in the case of an inclosure Act or award, that the lord in whose favour the mines are reserved or regranted may be authorised to work the minerals and enjoy the property as fully and freely as if the inclosure Act had not been passed. The difficulty of applying such an hypothesis to the altered condition of things brought about by an inclosure Act has, as it seems to me, led this House to treat the provision in which it is found, and of which it would seem at first sight to be the keynote, as a dead letter for any practical purpose."

No limitation or alteration of these rules has been introduced by any subsequent decision. Indeed in *Butterley Co.* v. *New Hucknall Colliery Co.* (1)—where it was held that on the construction of a lease the right of support from subjacent minerals was excluded—the House of Lords expressly approved and applied the statements which I have quoted from the *Butterknowle* case. (2)

The material provisions in the 1810 Inclosure Act are those contained in the proviso dealing with the rights of the lord of the manor. Read shortly they are as follows: "Nothing in this Act contained shall be construed or adjudged to extinguish defeat release lessen or prejudice the right title or interest" of the lord of the manor "of in or to any mines of coal" and a number of specified metals followed by the general words "or to any other mines ores or minerals whatsoever, or to any beds of marl and clay (save and except all quarries of stone and slate, and such clay as is used for making common red bricks and tile)" already discovered or thereafter to be discovered in all or any of the allotments thereby directed to be made. The proviso contains express reservation to the lord of the manor of "full and free liberty to search for work dig win raise get carry away and dispose of" the excepted mines ores and minerals and also "to erect any engine or

(1) [1910] A. C. 381.

(2) [1906] A. C. 305.

engines, or other machines or buildings, and to open sink drive make and use such pits shafts soughs levels roads and ways in through upon and over " the allotments as may be thought necessary for the purposes of the reservation. Pausing here it is to be observed that the word " under " is absent. The proviso goes on to state that the lord is to make and pay full and ample satisfaction to the allotment owners for any damage which shall or may be thereby—that is by the exercise of the powers reserved to the lord—" occasioned to the surface of the lands so allotted." The proviso concludes with a declaration that the lord of the manor is " to have hold use exercise take and enjoy all and every the seigniories rights . . . . authorities liberties privileges advantages and emoluments " belonging or incident to the manor other than and except all quarries of stone and slate and such clay as is used for making common red bricks and tile as aforesaid " in as full ample and beneficial a manner, to all intents and purposes as he . . . . [had theretofore] held used exercised or enjoyed or might or could have held used exercised and enjoyed . . . . the same in case " the general Inclosure Act and the 1810 Inclosure Act had not been made.

In the first instance I propose to consider the words of the proviso apart from any evidence as to mining methods and knowledge in or before 1810. The language is undoubtedly wide but it is not wider than that to be found in some of the other Inclosure Acts which have been already considered in these Courts. If the test laid down in the *Butterknowle* case (1) is applied—and it is assumed that there is introduced into the 1810 Act an express provision that the mines and minerals must be worked so as not to let down the surface—it seems to me that there is no difficulty in construing the Act without rejecting any part of it as being inconsistent with the provision so introduced. I consequently come to the conclusion that there is no provision in the 1810 Act on its true construction to exclude the right of support. The question then arises whether the evidence submitted in this case has introduced by way of necessary implication an unequivocal

(1) [1906] A. C. 305.

intention to exclude the right of support. To bring about this result the evidence must be sufficient to satisfy the Court that at the date of the passing of the 1810 Act it was known that the reserved mines and minerals could not be worked at all by the methods then employed in the district without letting down the surface. The evidence falls to be considered without reference to any light which might be thrown on it by reason of modern knowledge or modern systems of working. It has been suggested in this case, as it apparently was suggested in some of the more recent cases, that it is now known that there is no method by which any coal can be worked in any part of the country so as not to cause subsidence. Maugham L.J. pointed out in the most recent case to be found in the reports, see *Warwickshire Coal Co.* v. *Coventry Corporation* (1), that such a statement requires modification and explanation and is probably only true if applied to the working of coal at a commercial profit by the means now in use and with prices and wages as they are at the present time.

I have carefully considered the evidence in the present case. It was stated in argument that the plans of the workings of coal in this district produced during the hearing were more complete than in any of the previous cases of a like nature tried in these Courts. The plans show that coal was being worked in this district before 1810 by a system which is a modification of that known as " the long wall system." It is said that under the system used the surface must have invariably subsided and that persons living in the district could not have failed to see that subsidence ; but the plans themselves establish that in working the system it was usual to leave support for buildings and reservoirs if necessary, and that there was no difficulty in making variations in the system of working in any case where it was necessary to leave support. I do not think the available evidence justifies a finding that it was common knowledge in the year 1810 that it was impossible to work coal in this district without letting down the surface. The evidence establishes that at this date the deepest workings of coal then known in this country were

(1) [1934] Ch. 488, 517.

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carried out on a commercial basis under systems which entailed the retention of a high percentage of coal in order to prevent surface subsidence.

In my judgment the defendant company has not discharged the onus of satisfying the Court that the common law right of support was excluded by necessary implication on the true construction of the 1810 Act, and I hold that the vendors to the council had in 1901 and 1914 respectively a common law right to have the surface of the lands conveyed to the council supported by the subjacent minerals and adjacent land and minerals.

The next question that arises is, did this common law right of support pass to the council by the conveyances of 1901 and 1914? Apart from any statutory enactment prohibiting such a result it would seem to be reasonably clear that a vendor entitled to land without the subjacent minerals, but with a right to have his land supported by the subjacent minerals and the adjacent land and minerals, is at liberty to sell his land together with that right of support. If such a vendor sells to a purchaser other than a statutory undertaker, it is clear that that purchaser gets the vendor's land together with the right of support attached to it. Why should not the statutory undertaker get the same advantage? It is said he is precluded from doing so by reason of the provisions of the Waterworks Clauses Act, 1847, and the Public Health Act 1875 (Support of Sewers) Amendment Act, 1883, and by the decided cases.

The provisions relied on are those to be found in ss. 18 to 27 of the Waterworks Clauses Act, 1847, and s. 3, sub-s. 2, of the Public Health Act 1875 (Support of Sewers) Amendment Act, 1883. The sections are frequently referred to in cases like the present as "the Code." Sect. 18 provides that the undertakers are not to be entitled to any mines under any land purchased by them "unless the same shall have been expressly purchased." This section has no application to the present case because the vendors to the council never had any of the minerals under the land sold by them. Sects. 19, 20 and 21 provide for the making and deposit of certain maps or plans of the undertakers' works and for their inspection. Sect. 22 is in these terms : " Except where otherwise provided for by agreement between the undertakers and other parties, if the owner, lessee, or occupier of any mines or minerals lying under" the waterworks "or within the prescribed distance, if any, and if no distance be prescribed within forty yards therefrom, be desirous of working the same, such owner, lessee, or occupier shall give the undertakers notice in writing of his intention so to do, thirty days before the commencement of working ; . . . ." In that event the undertakers may, to put it shortly, prevent the working of the mines and make compensation to the mineowners. This section was slightly amended in the case of tenants for life by the Settled Land Act, 1925, s. 58, sub-s. 3, and also in the case of a university or college by the Universities and College Estates Act, 1925, s. 17, sub-s. 3, but neither of these amendments affect the question now before the Court. Sect. 23 provides for the cases in which the undertakers are unwilling to make compensation. In any such case the mineowner is enabled to work the mines " by means of engines or otherwise, as if this Act and the special Act had not been passed, so that no wilful damage be done to the said works, and so that the said mines be not worked in an unusual manner ; . . . ." Sects. 24 to 27 deal with matters which are not material to be considered for present purposes.

Sect. 3, sub-s. 2, of the 1883 Act (which only applies to cases where the undertakers are local authorities) provides that " the local authority, by or with any notice under the Waterworks Clauses Act, 1847, of willingness to treat for or make compensation, or of intention to prevent or interfere with the working of any mines, may specify and define the nature and extent of support which they require to be left, and any such notice may extend to minerals beyond the distance of forty yards mentioned in the said Act or to such less distance as the local authority may think fit."

The decisions with reference to " the Code " (and for this purpose I include the cases under the somewhat similar provisions of the Railways Clauses Act, 1845) have settled beyond further controversy that in cases where the undertaker purchases from an owner who is entitled to land and the minerals under it, the undertaker who does not expressly purchase the minerals gets no common law right to support for his land from the minerals or from the adjacent land or the minerals under it within forty yards of the land purchased, and is relegated solely to such rights and privileges with regard to subjacent minerals and adjacent land and minerals as is conferred on him by "the Code." But the common law right to support beyond the forty yards limit is left untouched. It was decided in the *New Moss Colliery, Ld.* v. *Manchester Corporation* (1) that an undertaker purchasing by agreement land expressly including the subjacent minerals is not affected by "the Code," and that the common law right of support for the land and the subjacent minerals from the adjacent land and the minerals under it remains unimpaired. There is no actual decision covering the case where the undertaker purchases by agreement land from which the minerals have been completely severed before the purchase so that the land and the minerals are in different ownership. Of course, if, on the severance, the mineral owner became entitled to work so as to let down the surface and the owner of the land has no right of support, no question can arise, because the undertaker purchasing from the owner of the land could not by any possibility acquire from him a right of support which he himself had not got. But if, on the severance, the owner of the land obtained a common law right to support, it is difficult to appreciate why that owner should not be free to sell to the undertaker by agreement his land with that right of support, or why the undertaker should not be free to purchase it; or why—having purchased it—the undertaker should not be entitled to rely on it. It is equally difficult to understand why in such a case the mineowner should be freed from his duty to support the land by reason of the fact that the owner of the land has, instead of keeping it or transferring it to a transferee other than a statutory undertaker, sold it to a statutory undertaker. If such be the case, the statutory undertaker is deprived of the right of support attached to the land purchased, although he has paid for such right and the mineral owner is without payment freed from a burdensome duty to his own pecuniary advantage. There is certainly no express provision in "the Code" prohibiting a statutory undertaker from purchasing by agreement land with a right of support from the subjacent minerals from the owner who has such a right attached to his land as against the mineral owner, and if the statutory owner is precluded by "the Code" from purchasing the common law right of support in such a case, it must be because there is some necessary implication to that effect introduced by the actual provisions of "the Code." It is to be observed that s. 22, which lays down the conditions precedent to the working of the minerals by the mineral owner, is introduced by the words "except where otherwise provided for by agreement between the undertakers and other parties," that is parties other than the particular mineral owner. It seems to me that these words exclude from the operation of the section a case in which there is an agreement between the undertaker and a third party affecting the right of support, and that a purchase of land from a third party with such right of support is an agreement within the express words of this exception.

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(1) [1908] A. C. 117.

In my judgment the principles laid down in the *New Moss Colliery* case (1) are applicable to the present case and lead to the conclusion that the council was free to purchase surface land with the right of support from the Otter trustees and that the purchases made in 1901 and 1914 were outside the provisions of "the Code."

It is said however that I am precluded from coming to such a conclusion by authority which is binding on me. The authority relied on is the decision of the Court of Appeal in *Pountney* v. *Clayton*. (2) The question in that case arose in respect of a compulsory purchase under the Railways Clauses Consolidation Act, 1845. The railway company had purchased surface land under the compulsory powers conferred by its special Act incorporating the Lands Clauses Consolidation Act,

(1) [1908] A. C. 117.

(2) 11 Q. B. D. 820, 840, 841.

1845. There was no purchase of the minerals nor was any compensation paid for them. The vendor was the owner of the minerals in question, subject to a demise thereof to the defendants for a term of years. The mineowner had reserved a right of support for the surface during the term of the lease, but there was no complete severance of the minerals from the surface because the reversion expectant on the determination of the lease remained vested in the vendor. The surface purchased by the railway company was sold as superfluous land to the plaintiff by the railway company. The minerals were worked by the defendants (the lessees) and subsidence was thereby caused. It was held that the plaintiff acquired no higher right than the railway company from which he derived his title and had no cause of action against the lessees. It is plain that if there had been no demise of the minerals, the railway company would have got no right of support from those minerals by reason of the purchase of the surface. It is true that the vendor had by reason of the demise a right as against the lessees to have the surface support during the term of the lease. It is equally plain that the railway company did not in express terms acquire from the vendor any right of support during the term of the lease, and it is difficult to understand why in that case it should be said that the existence of the contractual right of support during the term of the lease should have resulted in the transfer of the complete common law right of support for all time by reason of the conveyance of the land without the subjacent minerals. On the actual facts of the case the point which has arisen for decision by me was not before the Court and was not considered, with the result that so far as the present case is concerned, the statements which are now relied on by the defendant company are dicta. Bowen L.J. appears to have drawn a distinction between the right of a railway company to have the surface supported where the purchase is by agreement and its right where the purchase is compulsory. After enumerating the rights of the surface owner where there are minerals under that surface, he divided surface owners into four classes. The third is the class material to the consideration of the present case, and is that in which the surface owner has the right to support created by the document which effected the severance, in which case the extent of the right of support depends on the terms of the document and their true construction. Pausing there, the Otter trustees, who sold the surface lands to the council in the present case, fall within this class. Bowen L.J. proceeded to consider the case of a railway company making a purchase from the surface owner voluntarily. He says this: " What in that case does such company get from the surface owner? first, they get only what he has got to give, and secondly, what he intended to give, and as to that last one must look at and construe the deed of conveyance." He then proceeded to consider the position of each class of surface owner from that point of view, and said with regard to the third class: " the surface owner in the third class is one whose right to support depends on the document, and if by virtue of it he can give the right to support he gives it to the railway company." This dictum seems to apply to and cover the present case. He goes on to say: " I wish to observe that where he "—that is the surface owner—" was the lessor of the mine, and has such right to support created by the deed by which he leased the mines, he transfers the right to support to the railway company to whom he has conveyed the surface, not because the covenant between his lessee and himself runs with the land, but because, if such was the intention of the parties, the railway company are entitled to the benefit of any covenant express or implied between the lessor and lessee." The intention, as Bowen L.J. has already pointed out, depends on the construction of the conveyance. In the absence of an express assignment of the benefit of the covenant, it would be difficult to imply such an intention in the absence of any reference to the right of support on the determination of the lease. Having dealt with the position of a voluntary purchase, he proceeds to consider the case of a compulsory purchase under the Act, and decides that the surface owner who still has an interest in the minerals is still entitled to such rights as are afforded to a vendor on a compulsory sale notwithstanding

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the fact that he has made a partial disposition of the minerals by reason of an existing demise.

It must further be borne in mind that the provisions of the Railways Clauses Act, 1845, differ from those of the Waterworks Clauses Act, 1847. Sect. 78 of the former Act, which corresponds to s. 22 of the latter, does not contain the words to which I have already referred—namely: "except where otherwise provided by agreement between the undertakers and other parties"; while s. 79 of the former Act provides that the mineowner's power to work in default of a counter notice is "in a manner proper and necessary for the beneficial working thereof, and according to the usual manner of working such mines in the district where the same shall be situate"; in other words, this section confers on the mineowner a new power to work the minerals, and this is the only power on which he can rely. On the other hand, s. 23 of the Waterworks Clauses Act, 1847, provides that the mineowner may work "as if this Act and the special Act had not been passed." These words seem to me to be apt not to create a new statutory power of working but to lift the embargo imposed by s. 22 on the exercise of the right which existed apart from the Act. The restrictive words which follow: "so that no wilful damage be done to the said works, and so that the said mines be not worked in an unusual manner," seem to me to support this view.

The view I have ventured to express with regard to the decision in *Pountney* v. *Clayton* (1) is in accordance with that taken by Cave J. in the *Consett Waterworks Co.* v. *Ritson.* (2) It is true that in that case Smith J. expressed a different view of *Pountney* v. *Clayton* (1), but with the greatest possible deference to that learned judge and with due humility, I feel bound to state my preference for the opinion and reasoning in support of it to be found in the judgment of Cave J.

In my judgment and for the reasons I have endeavoured to state, I think that the right of support, which the Otter trustees had by reason of the provisions of the 1810 Inclosure Act, passed to the council; and that the defendant company was not and is not entitled to ignore those rights although

(1) 11 Q. B. D. 820.

(2) 22 Q. B. D. 318, 335.

the council failed to give any counter notice under s. 23 of the 1847 Act.

So far I have only dealt with the position under the 1847 Act. If I am wrong in the view I have expressed as to the effect of that Act, it is I think well settled that there is nothing in it to affect the council's right to support from the minerals outside the forty yards area; see *London and North Western Railway Co.* v. *Howley Park Coal and Cannel Co.* (1) Has this position been altered in the case of statutory undertakers who, like the plaintiff council, are also local authorities by s. 3, sub-s. 2, of the Public Health Act 1875 (Support of Sewers) Amendment Act, 1883? The section is difficult to construe, but it seems to me to confer on the local authority undertaker an option to acquire or prevent the working of minerals beyond the forty yards area. The words of the section are in form permissive and there is nothing in the section depriving the local authority of such right as it may have outside the forty yards area if the option is not exercised; and for this reason I think the council's right to support remains unaffected outside that area because it did not in fact exercise the option.

Having regard to the answers given by me to the first and second questions, the third and fourth questions propounded by me do not arise and I do not propose to consider them.

The fifth question is: Is the council entitled to any relief in view of the answers given to the first and second questions? In my judgment the council is entitled to a declaration that the defendant company is not, in the events that have happened, entitled to work the Parkgate seam or any other minerals under the waterworks or under the adjacent land, whether within or beyond the forty yards area, in any manner so as to interfere with the council's common law right of support for their land in its natural state. Having regard to the evidence that the possibility of future damage is remote, I do not think it is necessary to grant any injunction at the present time. The order I propose to make will reserve liberty to the council to apply for an injunction, if so advised.

During the argument a question arose as to the meaning

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(1) [1911] 2 Ch. 97.

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of the words in s. 23 of the Waterworks Clauses Act, 1847, conferring on the mineral owner the right to work the minerals in the events there stated "so that no wilful damage be done to the said works." On the prima facie meaning of these words, it would seem to prohibit the mineral owner from working the minerals, even though the statutory undertaker has not expressed its willingness to make compensation to the mineral owner if the mineral owner knows that the inevitable consequence of his working must result in damage to the undertaking. It is not necessary to decide this question at the present moment and I only refer to it to call attention to the fact that such a question may hereafter arise.

There will be an inquiry as to the damages sustained by the council by reason of the defendant company's mining operations, and I order the defendant company to pay the costs of the action up to and including the date of this order. The costs of the inquiry will be reserved and there will be general liberty to apply.

Solicitors: *Ridsdale & Son, for Nicholson & Co., Wath-upon-Dearne; Johnson, Weatherall, Sturt & Hardy, for Parker Rhodes, Cockburn & Co., Rotherham.*

A. R. T.

FARWELL J.

1935

Oct. 17.

In re MacIVER'S SETTLEMENT.

MacIVER *v.* RAE.

[1935. M. 1714.]

Settlement—Company—Preference shares held by Trustees—Dividends in arrear—Scheme of Arrangement—Trustees receive ordinary shares in lieu of arrears of dividend—Capital or Income.

Dividends on preference shares in a company being several years in arrear, a scheme was approved by the shareholders and sanctioned by the Court, whereby the ordinary shareholders surrendered part of their holding to the preference shareholders, the latter consenting to waive their right to the arrears of dividends. Under the scheme trustees of a settlement received ordinary shares in lieu of the arrears of dividend due on a block of preference shares forming part of the trust estate:—

Held, that the ordinary shares received by the trustees were to be treated as income and belonged to the tenant for life.

ORIGINATING SUMMONS.

The plaintiffs were the trustees of a settlement, dated August 12, 1916, under which certain shares were settled on trust to pay the income to the defendant Mrs. Rae during her life, and in the event of her dying in the lifetime of her husband, the defendant G. B. Rae, to her husband for life, and subject thereto to hold the shares in trust for the children or remoter issue of Mrs. Rae, as she should by will or codicil appoint, and in default of appointment in trust for all her children in equal shares. There were three children of the marriage, the infant defendants.

The original shares were sold in 1922 and the proceeds were invested in various securities, including 3000 6½ per cent. cumulative preference shares of 1*l.* each in Richard Thomas & Co., Ld. (hereinafter called "the company"). At that date the company had a nominal capital of 9,000,000*l.*, divided into 4,000,000 preference shares of 1*l.* each and 5,000,000 ordinary shares of 1*l.* each. Under the articles of association of the company the preference shares were entitled to a fixed cumulative preferential dividend of 6½ per cent. (free of income tax up to 6*s.* in the £) and were also preferential over the ordinary shares as regards repayment of capital and arrears of dividend in a winding up. No dividend was paid in respect of the preference shares for the seven years ending March 31, 1934, and in December, 1934, at which date the issued capital of the company consisted of 3,120,346 preference and 2,790,560 ordinary shares, fully paid, a scheme was formulated by the company whereby each of the 2,790,560 ordinary shares was divided into three shares of 6*s.* 8*d.* each. Of the resulting 8,371,680 ordinary shares, the ordinary shareholders were to retain 2,790,560 and the remaining 5,581,120 were to be contributed by the ordinary shareholders and forfeited by the company and distributed among the preference shareholders, in consideration of their consenting to the cancellation of the arrears of dividends on their shares. The scheme was approved at meetings of the shareholders on January 28, 1935, and was sanctioned by the Court on February 25, 1935. Pursuant to the scheme the plaintiffs were allotted 5365 ordinary shares in the company and were paid a small amount in cash, representing proceeds of sale of fractions of shares to which the preference shareholders were entitled.

The plaintiffs, having been requested by Mrs. Rae to transfer to her the 5365 ordinary shares, took out this summons, asking that it might be determined whether, in the events that had happened, the 5365 ordinary shares ought to be treated as income or as capital of the settled share of Mrs. Rae under the settlement, or whether they ought to be apportioned in any and in what way between income and capital.

Harold Brown for plaintiffs.

J. B. Lindon for the tenant for life. There are two views of the scheme. The first view is that it was an allotment of forfeited shares by the company in respect of a dividend right, not in respect of any right as to capital. Although there was an issue of shares in the company there was: (1.) no appropriation of profits to capital or increase of capital; (2.) no capitalization by the company or direction by the company that anything should be capital; (3.) there was an increase in the participants' interests, unlike cases of capitalization where there is none. *In re Tedlie, Holt* v. *Croker* (1) was a case of an issue in satisfaction of all preferential rights as to dividends and capital and was distinguishable from the present case. The allotment in this case was in substitution for an income right; a conditional right to dividend: *In re Wakley, Wakley* v. *Vachell.* (2) *In re Sandbach, Royds* v. *Douglas* (3) was very similar to the present case and ought to be followed. There could be no differentiation between shares and cash.

The other view of the scheme was that it was pure machinery and was substantially a transfer by ordinary shareholders. It was really a sale of a dividend right.

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(1) (1922) 91 L. J. (Ch.) 346.

(2) [1920] 2 Ch. 205.

(3) [1933] Ch. 505.

E. Ackroyd for the infant defendants. Before the sanction of the scheme by the Court the accumulation of rights in respect of the cumulative preference shares was part of the rights conferred by those shares to which the life tenant had no claim until cash dividends were declared: *In re Wakley.* (1) The transaction was a purchase by the ordinary shareholders of certain rights inherent in the preference shares, but to which the tenant for life had no accrued title, and there was no consideration passing from the company. Therefore the case was really governed by *In re Tedlie, Holt* v. *Croker.* (2) *In re Sandbach, Royds* v. *Douglas* (3) was distinguishable.

Farwell J. The plaintiffs are the trustees of a settlement dated August 12, 1916, made by Mrs. E. E. MacIver under which certain shares were settled on trust to pay the income to the settlor's daughter, the defendant Mrs. Rae, during her life, and in the event of her dying in her husband's lifetime to her husband for life, and subject thereto for the benefit of the children of the marriage, and in the event of her surviving her husband for Mrs. Rae absolutely. Mr. and Mrs. Rae are still living, and there are three children of the marriage who are infants. The shares which were the original subject-matter of the settlement have been sold, and part of the proceeds invested in 3000 cumulative preference shares of Richard Thomas & Co., Ld. That company has an authorized capital of 9,000,000*l.*, of which 4,000,000*l.* consisted of 6½ per cent. cumulative preference shares of 1*l.* each and the balance ordinary shares.

By the articles of association the preference shares are to be paid off in full in priority to the ordinary shares in the event of a winding up, but have no right to any further share in the assets. For the seven years ending March 31, 1934, no dividends on the preference capital were paid, with the result that by that time the preference dividends were over

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(1) [1920] 2 Ch. 205.
(2) 91 L. J. (Ch.) 346.
(3) [1933] Ch. 505.

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1,800,000*l.* in arrears. It was decided by the Court of Appeal in *In re Wakley* (1) that preference shareholders have no absolute but only a conditional right to arrears of dividend, but that if and when a company acquires assets sufficient to pay off the arrears and declare a dividend, that dividend belongs to the persons who are then the registered holders ot the preference shares.

In this case Richard Thomas & Co., Ld., arranged to discharge all liability for unpaid dividends by a scheme which was approved by the shareholders and subsequently sanctioned by the Court. Under that scheme the preference shareholders waived their conditional right to arrears of dividend; the ordinary shareholders surrendered the equivalent of 1,800,000 shares which had been subdivided, so as to reduce the value of the ordinary shares from 1*l.* to 6*s.* 8*d.* each, and the shares so surrendered were distributed among the preference shareholders in consideration of their consenting to the wiping out of all arrears of their dividends.

The scheme was approved by the Court early in 1935. The result was that the preference shareholders agreed to sell their claim to arrears of dividends, and in consideration thereof to receive ordinary shares provided by the ordinary shareholders, who gave up two-thirds of their holdings. In pursuance of that scheme the trustees received a large holding of ordinary shares of the company.

It is quite plain that, if the company had been in a position to pay dividends sufficient to wipe out the arrears, the whole of the sum so paid would have belonged to the tenant for life. The question is whether it makes any difference that the trustees, instead of receiving cash, received ordinary shares. There is nothing in the scheme by which the company capitalized any moneys.

It is said that this case is covered by a decision of Eve J. in *In re Tedlie* (2), but that is quite a different case.

On the whole I have come to the conclusion that the ordinary shares so allotted to the preference shareholders must be treated as income and not as capital, and therefore belong to the persons who would have been entitled to the arrears of preference dividend if they had been paid in cash. The costs of all parties will be paid out of the fund.

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(1) [1920] 2 Ch. 205.

(2) 91 L. J. (Ch.) 346.

Solicitors for all parties: *Alsop, Stevens & Collins Robinson, Liverpool.*

P. J. B.

FARWELL J.
1935
Nov. 13.

In re HODGSON.

NOWELL *v.* FLANNERY.

[1935. H. 1800.]

Will—" Money "—National Savings Certificates—Do not pass under Gift of " My Money "—Admissibility of Extrinsic Evidence.

A testatrix, by her will, bequeathed " my money " to two named persons " equally divided." At the date of her will and at the date of her death her estate amounted to about 1438*l.* 3*s.* 11*d.*, and included National Savings Certificates of the value of 621*l.* 13*s.* 1*d.* and 31*l.* 11*s.* 6*d.* 3½ per cent. War Stock. The remainder of her estate consisted of cash:—

Held, that in the absence of any context to the contrary in the will the word " money " must be given its primary meaning, and that it did not carry the National Savings Certificates or the War Stock.

The admissibility of extrinsic evidence discussed.

Originating Summons.

By her will dated July 19, 1934, the testatrix bequeathed " my money to John Derek Fortescue Flannery and John Douglas Stewart Nowell equally divided." J. D. F. Flannery was the infant defendant and J. D. S. Nowell was one of the plaintiffs.

The testatrix died on July 21, 1934, without leaving any known relations. On May 22, 1935, letters of administration of her estate with the will annexed were granted to the plaintiffs, and it was a condition of the grant that this application should be made.

The gross value of the estate of the testatrix amounted to about 1438*l.* 3*s.* 11*d.*, and included National Savings Certificates of the value of 621*l.* 13*s.* 1*d.*, which were purchased

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between March 20, 1919, and May 12, 1928, and a sum of 31*l.* 11*s.* 6*d.* 3½ per cent. War Stock, purchased in August, 1917. The remainder of her estate consisted of cash.

This summons raised the question whether the National Savings Certificates and the War Stock passed under the bequest of "my money."

Raymond Jennings for the plaintiffs.

J. F. Bowyer for the infant defendant. The word "money" is wide enough to carry National Savings Certificates. They merely represent money borrowed by the Government and are only issued by the Post Office: s. 59 of the Finance Act, 1920. The holder of them has the right to have them repaid on demand: s. 46 of the Finance Act, 1926. They are, therefore, in the same position as money on deposit at a bank, and that has been held to be "money." Lord Selborne uses language in *Byrom* v. *Brandreth* (1) which shows that he felt bound by the special circumstances of that case to give "money" its strict meaning. There are no such special circumstances in this case, and the Court is free to give the word a wider meaning.

The meaning of the word "money" was greatly extended by the Court of Appeal in *In re Taylor. Taylor* v. *Tweedie.* (2) In *In re Cadogan. Cadogan* v. *Palagi* (3) the word was held to pass all the personal estate of the testatrix.

[He also referred to *In re Gates. Gates* v. *Cabell.* (4)]

Andrewes-Uthwatt for the Attorney-General. The word "money" does not include National Savings Certificates or War Stock and, as the testatrix died without leaving any known relations, they fall to the Crown as bona vacantia. The Court can admit extrinsic evidence to show what was the state of a testator's affairs at the time of his death, or any evidence that will help the Court to interpret the will. The question of extrinsic evidence is very ably dealt with in Wigram on Interpretation of Wills, 3rd ed., p. 183 (5), under

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(1) (1873) L. R. 16 Eq. 475, 478.

(2) [1923] 1 Ch. 99.

(3) (1883) 25 Ch. D. 154.

(4) [1929] 2 Ch. 420.

(5) P. 198, 5th ed.

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the heading " General Conclusions " and at p. 51 (1) under the heading " Proposition V." It is therefore admissible to produce evidence to show what her property consisted of at the date of her death. It is shown in this case that the testatrix had over 600*l.* in actual cash at the date of her death. It is not, therefore, necessary to extend the meaning of the word " money."

FARWELL J. This summons raises a short point on a very short will. It is not without interest: and the conclusion at which I have arrived is one to which I confess I come with some little regret.

The facts are these. The testatrix was a lady who had been a nurse to two families. She had been the nurse of the infant defendant, and also of the plaintiff, John Douglas Stewart Nowell. She was removed to hospital in a very serious state of health: and she was asked by one of her friends whether she would make a will. She was not very willing to do so, but she was pressed to make one, because, as was pointed out to her, if she had no relations, as seemed to be the fact, on her death her property would go to the Crown. In those circumstances, she rather unwillingly did make a will. She apparently had at the hospital with her the whole of her worldly wealth. That consisted of certain National Savings Certificates, a certain amount of War Stock, and a certain amount of money. They were contained in an attaché case, which went with her to the hospital, and were looked after there by the authorities, and were there at the time of her death.

[His Lordship stated the date of the will and the death of the testatrix, and read the will, and continued:] I am entitled to know the surrounding circumstances at the time when the will was made, and at the time of the death. I have already stated how the lady came to be in the hospital; and her position at the time when she made her will. But further, I am entitled to know what her property consisted of at her death. It appears from the evidence before me that [His

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(1) P. 56, 5th ed.

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Lordship stated the facts relating to the estate set out above, and continued :] In construing this will, I have to start with this : that I am bound to give the word "money" its primary meaning, unless I can find something which justifies me in giving it a more extended meaning. What exactly is the meaning of the word "money" in its strict sense I will state in a moment. But I desire to say what in my view is the way in which evidence is admissible in a case of this kind : and the use to which it can be put. Wigram V.-C. in his invaluable book states the general conclusion on this matter in the third edition on p. 183 (1) : and I accept as accurate that statement of the law.

I think that it comes to this : the duty of the Court in the first place is to read the will itself. The Court is bound in the first instance to read it, giving the words used their primary and proper meaning. The Court is then entitled to look at the surrounding circumstances. If the surrounding circumstances are such that the words of the will, if construed in accordance with their primary meaning, are not apt to apply to any of the circumstances, then the Court is entitled, having regard to the surrounding circumstances, to see whether the language used is capable of some meaning other than its ordinary meaning, not for the purpose of giving effect to what the Court may think was the intention of the testator, but for the purpose of giving effect to what the intention of the testator is shown to be from the language used having regard to the surrounding circumstances. In other words, the Court is not entitled to disregard the language which the testator has used in order to give effect to what the Court may think to have been the intention, but the Court is entitled to say that the words which the testator has used were not intended to have their primary meaning if the surrounding circumstances are such as to lead inevitably to that conclusion.

Here I am faced with this. There is nothing in the will but the words "my money." That by itself is clearly not sufficient to pass anything but cash, that is to say, actual

(1) P. 198, 5th Ed.

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ready money, money at a bank at call and, having regard to the decisions, money on deposit at a bank, and I have to look at the surrounding circumstances to see whether I ought to give to the word "money" any meaning other than its primary meaning. This lady did possess money, that is to say, cash, and the words "my money" are apt as applied to that—that is to say, she had cash, and the words "my money" are exactly apt to pass that. Am I then entitled to say that it was used in some wider meaning? In my judgment the answer to that must be in the negative. Can I then say that the National Savings Certificates are money in the strict meaning of that word? It is said that I can on the ground that those Certificates are in the same category as money on deposit at a bank, which has been held to be included in the term "money." I regret I am bound to come to the conclusion that the word "money" is not apt to include securities of this nature. It is true that, by giving notice, the money which has been lent to the Government is repaid to the lender; but none the less in my judgment the certificates are not money in any proper sense of the word at all. National Savings Certificates are transferable inter vivos, and can be passed at death. It seems to me impossible to treat them on the same footing as money on deposit at the bank.

On the whole, I have come to the conclusion that this lady died intestate as to the whole of her estate, except what was actually cash, and that neither the National Savings Certificates nor the War Stock pass under this will.

Solicitors: *Duffield, Bruty & Co.; Waltons & Co.; The Treasury Solicitor.*

P. J. B.

BENNETT J.

1935

Dec. 2.

In re HECTOR WHALING, LIMITED.

[00626 of 1935.]

Company—Special resolution—Notice convening meeting—Length of notice—" Not less than twenty-one days "—Interpretation—Articles of Association cannot modify the Statute—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 117, *sub-ss.* 2, 6.

The period of not less than twenty-one days prescribed by s. 117, sub-s. 2, of the Companies Act, 1929, relating to notices of meetings in connection with the passing of special resolutions, means a period of not less than twenty-one clear days, exclusive of the day of service of the notice and exclusive of the day on which the meeting is to be held.

Provisions in the articles regulating the date on which a notice is to be deemed to be served must be considered; but an article which provides that the day of service of a notice is to be counted in the relevant number of days must be disregarded.

Rex v. *Turner* [1910] 1 K. B. 346 and *Chambers* v. *Smith* (1843) 12 M. & W. 2 applied.

PETITION.

This was a petition by Hector Whaling, Ld., for the reduction of the capital of the company. The question arose at the hearing of the petition whether the special resolution for the reduction of the capital had been properly passed in accordance with the provisions of s. 117. (1) The notice convening the meeting of the company was dated May 8, 1935, and it convened an extraordinary general meeting of the company on May 30, 1935. The notice was posted on May 8, 1935, and was, therefore, by virtue of art. 138 of the company's articles of association, deemed to have been served on May 9, 1935.

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(1) Sect. 117, of the Companies Act, 1929, provides as follows:—

" (1.) A resolution shall be an extraordinary resolution when it has been passed by a majority of not less than three-fourths of such members as, being entitled so to do, vote in person or, where proxies are allowed, by proxy, at a general meeting of which notice specifying the intention to propose the resolution as an extraordinary resolution has been duly given.

(2.) A resolution shall be a special resolution when it has been passed by such a majority as is required for the passing of an extraordinary resolution and at a general meeting of which not less than twenty-one days' notice, specifying the intention to propose the resolution as a special resolution, has been duly given. . . . .

(6.) For the purposes of this section, notice of a meeting shall be deemed to be duly given and the meeting to be duly held when the notice is given and the meeting held in manner provided by this Act or the articles."

The relevant articles are as follows :—

"133. A notice or other document may be served by the company upon any member either personally or by sending it through the post in a prepaid letter addressed to such member at his registered address.

138. Any notice or other document if served by post shall be deemed to have been served on the day following that on which the letter containing the same is put into the post, and in proving such service it shall be sufficient to prove that the letter containing the notice or document was properly addressed and put into the post office as a prepaid letter or prepaid registered letter as the case may be.

139. Where a given number of days' notice or notice extending over any other period is required to be given, the day of service shall be counted in such number of days or other period."

Lionel Cohen K.C. and *T. D. D. Divine* for the company. The meeting was properly convened by the notice. The question is whether in interpreting sub-s. 2 of s. 117 twenty-one clear days may include one of the two outside days—either the day on which the notice was served or that on which the meeting was held. Sub-s. 6 makes the notice valid if it is given in manner provided by the articles. The combined effect of sub-s. 6 and of arts. 133 and 138 is to enable the notice to be deemed to have been served at the expiration of the day on which it was presumed to have been posted.

[The following cases were referred to : *Rex* v. *Justices of the West Riding of Yorkshire* (1) ; *In re Railway Sleepers Supply Co.* (2) ; *Rex* v. *Turner* (3) ; *Chambers* v. *Smith* (4) ; *In re Pavilion, Newcastle-upon-Tyne, Ld.* (5) ; *Henthorn* v. *Fraser* (6) ; and *Sneath* v. *Valley Gold Ld.* (7)]

(1) (1833) 4 B. & Ad. 685.
(2) (1885) 29 Ch. D. 204.
(3) [1910] 1 K. B. 346.
(4) 12 M. & W. 2.
(5) [1911] W. N. 235.
(6) [1892] 2 Ch. 27.
(7) [1893] 1 Ch. 477.

BENNETT J. [after stating the facts, continued :] The first point to be decided is what is meant by the phrase "not less than twenty-one days' notice," contained in sub-s. 2 of s. 117 of the Companies Act, 1929. In the interests of everybody it is of importance that there should be no doubt as to the meaning of a phrase in a section of almost daily use. I do not think there is any doubt about its meaning, and I propose to found my decision on *Rex* v. *Turner* (1) and *Chambers* v. *Smith* (2) and to decide that the phrase means twenty-one clear days exclusive of the day of service and exclusive of the day on which the meeting is to be held.

The question then arises whether the effect of sub-s. 6 of s. 117 is to enable the company to say that the statutory requirement of sub-s. 2 that there was to be twenty-one clear days' notice has been cut down by the provisions of art. 139. [After reading sub-s. 6 his Lordship continued :] Art. 139 in my judgment has nothing to do with the service of the notice and nothing to do with the manner in which the notice is given. It is concerned entirely with the way in which time is to be measured, and I can see no ground on which I can properly decide that a company can by its articles of association curtail the length of time which Parliament has said must elapse between the date on which the notice is served and the date on which the meeting is held. Sub-s. 6 is concerned solely with the method of giving notice. Therefore I come to the conclusion that art. 139 is irrelevant for the purpose of the question which I have to decide.

In my view the petitioning company has failed to prove that the special resolution was properly passed. I will, therefore, adjourn the further hearing of the petition to enable the company to call a fresh meeting.

Solicitors : *Lawrance, Messer & Co.*

(1) [1910] 1 K. B. 346.

(2) 12 M. & W. 2.

J. L. D.

In re ANCHOR LINE (HENDERSON BROTHERS), LIMITED.

EVE J.

1935
Nov. 29.

[No. 00278 of 1935.]

Contract—Sale of Goods—Sale of Crane in deliverable condition—Delivery to purchasers—Deferred payment—Annual payments for "interest and depreciation"—Subsequent sale by liquidator—Whether property passed—Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *ss.* 18, *r.* 1, 25.

By a contract contained in letters, the purchasers agreed with the vendors' agents to buy a crane "for a deferred purchase price of 4000*l.*" The contract provided for annual payments by the purchasers for "interest" and "depreciation" respectively, to be deducted from the 4000*l.* In the meantime the purchasers were to have "entire charge and responsibility" for the crane. Three years later, and before completing the purchase, the purchasers passed a resolution for voluntary liquidation, and the liquidator sold all the assets to a new company:—

Held, that the property in the crane passed to the purchasers on the making of the contract, in accordance with r. 1 of s. 18 of the Sale of Goods Act, 1893.

SUMMONS.

The Ocean Steamship Company, Ld., prior to July, 1931, occupied a berth at Yorkhill Basin, Glasgow, where they had a 30-ton electric coaling crane. They left that berth in July, 1931, and later on it was taken over by the Anchor Line (Henderson Bros.), Ld. In February, 1929, negotiations were commenced for the purchase of the crane by the Anchor Line Company. Some delay took place in allocating the berth to the Anchor Line Company and until this was done that company would not enter into any contract. In July, 1931, the Anchor Line Company suggested that they would take over the crane on a rental basis with the option of purchase. Messrs. Alfred Holt & Co., the agents for the Ocean Company, wrote: "We suggest your making a deferred payment for the crane rather than renting it with an option of purchase, as you propose." After further correspondence, Messrs. Alfred Holt & Co. wrote a letter to the Anchor Line Company on September 3, 1931, the material portion of which was as follows:—

" Referring to the conversations which Mr. S. W. Ellis had with Mr. A. C. F. Henderson yesterday, we have pleasure in confirming the arrangement then come to with regard to the 30-ton electric crane at Yorkhill Basin.

(1.) We agree that you take over the crane, coaling cradle, and carriage and the electric cable serving the crane for a deferred purchase price of 4000*l.*

(2.) Until the completion of the purchase you agree to pay us for interest and depreciation at the rate of 350*l.* per annum for the first two years after taking over, 450*l.* per annum for the next two years and 400*l.* per annum thereafter.

(3.) Of these sums a proportion amounting to 240*l.* per annum or 6 per cent. of the purchase price of the crane is to be regarded as depreciation, and the total of these annual payments for depreciation is to be deducted from the above mentioned amount of 4000*l.*, in order to arrive at the balance actually to be paid by you on completion of the purchase whenever that may take place.

(4.) In the meantime you will have entire charge of and responsibility for the crane in every respect.

We suggest that the payments be made quarterly and that the date for your taking over the crane be fixed as from September 5, 1931."

The Anchor Line Company, by letter of September 4, 1931, to Messrs. Alfred Holt & Co. confirmed the arrangement and said they were prepared to take delivery of the crane on September 5, 1931. Between September, 1931, and March, 1935, the Anchor Line Company made regular quarterly payments to Messrs. Alfred Holt & Co., at first of 87*l.* 10*s.*, and later of 112*l.* 10*s.*, the total of which amounted to 1400*l.*

In April, 1935, the Anchor Line Company passed a resolution for winding up voluntarily. On May 1, 1935, a petition was presented to the High Court for compulsory winding-up of the company, and on May 13 a compulsory order was made thereon.

In the meantime, on May 11, the Official Receiver entered into a contract to sell all the assets of the Anchor Line Company to a new company, Anchor Line (1935), Ld. The assets included "thirdly all the movable plant machinery cranes of every description . . . . belonging to the old company and used in connection with the said business." This agreement was shortly afterwards sanctioned by the Court.

Messrs. Alfred Holt & Co. contended that the property in the 30-ton electric crane had not passed to the Anchor Line Company, and therefore was not included in the assets sold to the new company. They claimed that the liquidator must either accept the obligations arising and continue the instalments payable under the contract or return the crane to the Ocean Company. The liquidator rejected these claims.

The applicants issued this summons asking the Court to reverse the liquidator's decision and to make a declaration that the property in the crane had not passed to the Anchor Line Company.

Maxwell Fyfe K.C. and *Harold Brown* for the applicants. The legal position is dealt with in ss. 17 and 18 of the Sale of Goods Act, 1893. Under s. 17 on a contract for the sale of specific goods the property is transferred to the buyer at such time as the parties intend it shall be transferred, and the intention of the parties must be ascertained having regard to the terms of the contract, the conduct of the parties, and other circumstances. Under s. 18 rules are given to ascertain the intention of the parties, and by r. 1, where the goods are in a deliverable state the property in them passes to the buyer when the contract is made, unless a different intention appears from the terms of the contract.

It is submitted that the letter of the vendors' agents of May 3, 1931, shows that the intention was that the property should not pass until it had been paid for in full. This is shown by the provision as to depreciation. The word "depreciation" is capable of different interpretations, but here it can only mean "loss in value owing to use and wear." No meaning can be given to the word "depreciation" if the property passed on delivery.

Then there is the provision for the payment of interest on the purchase money at varying rates between 350*l.* and 450*l.*; this supports the above contention.

If that argument is correct, the interest is fixed on the theory that the 4000*l.* purchase money is outstanding all the time, and there is a payment for depreciation and another payment for interest.

The final clause of the letter that the purchasers are to have the charge and responsibility for the crane in every respect suggests that the property had not passed. Under s. 20 of the Act the risk prima facie passes with the property; therefore if the property had passed this clause with the phrase " in the meantime " would be superfluous. The words " on the completion of the purchase " are equally consistent with either contention: see *McEntire* v. *Crossley Brothers, Ld.* (1) The applicants are entitled to payment of the balance of the purchase money in full: *In re Levi & Co., Ld.* (2)

W. P. Spens K.C. and *Philip Sykes* for the respondents. The onus of proof that the property did not pass is on the applicants. We rely on the first rule under s. 18 of the Sale of Goods Act, 1893, and submit that it is immaterial whether the time of payment or the time of delivery is postponed.

This is not a hire-purchase agreement, but a contract of sale and purchase, the payment of the purchase money being deferred. What is called " depreciation " in the letter of May 3 really means instalments of purchase money. The amount charged for what is called " interest " cannot really be interest, as it first decreased, then increased, and then became fixed. The final words as to risk and responsibility are simply surplusage. On the facts, having regard to the whole correspondence, in which the crane was first offered on a hire-purchase agreement, and that offer was definitely refused, the intention must have been that the property should pass to the purchasers on delivery. The applicants never took any further interest in the crane after the date of the contract.

If we are not right on this construction, then a somewhat difficult question arises as to the rights of the vendor and the duty of the liquidator.

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(1) [1895] A. C. 457.

(2) [1919] 1 Ch. 416.

Here the Official Receiver sold all the assets of the company before the winding-up order was made, and afterwards the Court confirmed the sale.

There can be no question that the purchasers have acquired a good title to the crane, and they had no notice of any claim by the applicants, who were the original sellers. See s. 25, sub-s. 2, of the Sale of Goods Act. All that was done before the present liquidator was appointed. Even if the property did not pass to the purchasers, the applicants cannot claim the return of the crane; all they can do is to sue the liquidator for damages for conversion.

On either construction of this contract the word "depreciation" cannot be given any intelligible meaning.

Fyfe K.C. in reply. The payments for interest were not fixed capriciously, but having regard to the financial capacity of the purchasers to pay. These payments may be called "rent" or "interest." We are prepared to meet the difficulties suggested by the respondents on the second point.

EVE J. I cannot see my way to arrive at a conclusion differing from that at which the liquidator has arrived. I have to deal with what is admittedly an unconditional contract for the sale of specific goods, payment of the purchase price for which is to be deferred, it would seem, until the purchasers are in a position to carry out the contract. Looking at the contract itself, it is difficult to find anything from which the inference is to be gleaned that the real intention was not as expressed, that is to say, that the intention of the parties was different from that which would be inferred from the document on the application to it of r. 1 of s. 18 of the Sale of Goods Act, 1893. It is true it is not a very artistic document. I have had some difficulty in ascertaining why the payments were divided as they were, but it remains, as it seems to me, an unconditional contract, where the property must pass on the making of the contract.

Reliance is placed upon the use of the word "depreciation."

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That does not, in my opinion, amount to an indication that the property was not intended to pass. Nor again does the inclusion in this contract of something which would naturally have been implied therein, even though its actual expression were found in the document, that is to say, the clause with which the agreement concludes: "In the meantime you will have entire charge of and responsibility for the crane in every respect." I cannot bring myself to hold that that shows an intention different from that which would be implied without the words being there.

In these circumstances, I do not feel that I can reverse the decision at which the liquidator has arrived, and so far as this summons seeks to do that I must dismiss it with costs.

Solicitors: *Sharpe, Pritchard & Co., for Alsop, Stevens & Collins Robinson, Liverpool; Collyer-Bristow & Co.*

H. L. L.

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July 18, 19, 22.

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[1934. J. 1657.]

Company—Voluntary winding up—Future liabilities—Lease—Rent—Statutory duty of liquidator to pay debts—Negligence—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *ss.* 247, 261.

In September, 1925, certain premises were demised under two leases to a company, and each of the leases contained a personal covenant on the part of the company, as tenants, to pay the rent during the currency of the lease.

In January, 1933, notice was given by the company to determine the leases, with the result that they would come to an end at Michaelmas, 1938. In January, 1933, the premises were assigned to another tenant.

In April, 1933, the company went into voluntary liquidation and the liquidator distributed its assets without making provision for future rent due under the leases.

In an action brought by the lessors against the liquidator for a declaration that, in distributing the assets without making provision for the liabilities of the company under the two leases, he

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had acted wrongfully and negligently and in breach of his duty as liquidator, and for damages:—

Held (affirming the decision of Bennett J.), that the liability was one which ought to have been admitted to proof by the liquidator under s. 261 of the Companies Act, 1929, and that he had committed a breach of his statutory duty under s. 247 of the Act to pay or provide for the liabilities of the company, in not taking steps to have the value of the contingent liability ascertained, and that he was liable in damages to the plaintiffs.

Pulsford v. *Devenish* [1903] 2 Ch. 625 and *Hardy* v. *Fothergill* (1888) 13 App. Cas. 351 considered and applied.

ACTION.

This action was brought by the plaintiffs, James Smith & Sons (Norwood), Ld., against the defendant, Frank E. Goodman, for a declaration that in distributing the assets of a company named Brittain's Motors, Ld., to the shareholders of that company without making any provision for the liabilities of that company under two leases, the defendant acted wrongfully and negligently and in breach of his duty as liquidator of that company.

The following statement of the facts is taken from the judgment of Bennett J.:—

On September 28, 1925, the plaintiffs granted two leases to a limited company then named G. A. Brittain, Ld., of premises at Brighton. The first of the two leases was of premises known as No. 14, Imperial Arcade, Brighton, and they were demised to G. A. Brittain, Ld., from September 29, 1924, for a term of twenty-one years at the yearly rent, after June 24, 1928, of 300*l*. payable by equal quarterly payments on the usual quarter days, and a further yearly rent of 3*l*. towards the sum or sums which from time to time should be paid by the plaintiffs for the insurance of the premises. The second lease, also dated September 28, 1925, was of premises known as No. 15, Imperial Arcade and Nos. 89 and 90, North Street, Brighton. They were demised for a term of twenty-one years from September 29, 1924, at the yearly rent, after June 24, 1928, of 917*l*. 10*s*. payable by equal quarterly payments, and a further yearly rent of 3*l*. towards the sum or sums which should from time to time be paid by the plaintiffs for the insurance of the premises known as No. 15, Imperial Arcade, and also such sum or sums as should from time to time be paid by the plaintiffs for the insurance of the premises Nos. 89 and 90, North Street. Each of the leases contained covenants by the lessees, G. A. Brittain, Ld., to pay the yearly and other rents reserved and not to assign, underlet or part with possession of the demised premises without the consent in writing of the plaintiffs, and also a provision enabling G. A. Brittain, Ld., to determine the leases (by giving six months' previous notice in writing) on September 29, 1938. In March, 1929, G. A. Brittain, Ld., the lessees, changed their name and took the name of Brittain's Motors, Ld., and on January 6, 1933, that company served upon the plaintiffs (as they were entitled to do) notices for determining both the leases on September 29, 1938. In January, 1933, Brittain's Motors, Ld., applied to the plaintiffs for their consent to the assignment of both the leases to a Mr. Kingsman. That consent was given and the assignment of the premises comprised in the two leases in favour of Mr. Kingsman was executed on the March half-quarter day, February 6, 1933, and down to that day Brittain's Motors, Ld., paid the rent reserved by the two leases. Before those assignments were made Brittain's Motors, Ld., had endeavoured to persuade their landlords to accept surrenders of the leases. Their endeavours had failed, and Major Jackson, who gave evidence on behalf of the defendant, has said that these two leases were regarded by the directors of Brittain's Motors, Ld., as a drag upon that company.

On April 1, 1933, Brittain's Motors, Ld., passed a resolution for voluntary liquidation, having, before the resolution was passed, filed a statutory declaration of the solvency of the company, so that the liquidation became a members' voluntary liquidation within the meaning of the Companies Act, 1929. Brittain's Motors, Ld., at the same time as they passed the resolution for voluntary liquidation, appointed the defendant to be liquidator. It was the first liquidation in which the defendant had ever acted, and in order to qualify himself in discharging his duties he purchased a text-book from which he hoped to derive sufficient information to

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enable him to discharge them properly. The liquidation proceeded with the maximum speed and the minimum amount of publicity. There seemed to be an extraordinarily strong desire to bury the body of Brittain's Motors, Ld., with as much dispatch as possible So far as I know the only intimation given to the world of the fact that Brittain's Motors, Ld., was in liquidation was an advertisement in the London Gazette of April 4, 1933. In no other paper was any advertisement of the resolution for voluntary liquidation advertised and so far as I am aware no intimation was given to any creditor of the company that a resolution for voluntary liquidation had been passed. Before April 1, 1933, two circulars had been prepared—prepared with, I think, considerable care—one printed on green paper and the other on white, and copies are the exhibit "D. 1." The first of the circulars, the green one, was sent to all persons who appeared from the sales ledger of Brittain's Motors, Ld., to have been creditors of that company, and it is in these terms: "Dear Sirs. We shall esteem it a favour if you would please advise us on the attached form of the amount due to you by this company as at the 31st March, 1933. A stamped addressed envelope we enclose for your convenience. Thanking you, Yours faithfully, per pro Brittain's Motors Limited (blank) Secretary." That circular was in fact signed by Major Jackson, who was the secretary and managing director of Brittain's Motors, Ld., and attached to it is a form (which the recipient was to detach and send them) which was in these terms. It is addressed, not to the liquidator of Brittain's Motors, Ld., but to "The Auditor, Messrs. Brittain's Motors Limited, 233 Preston Road, Brighton." "Dear Sir. I/We beg to inform you the amount due to me/us by Messrs. Brittain's Motors Limited as at the 31st March, 1933, is (blank) pounds (blank) shillings (blank) pence." It is a form which is commonly used before an audit takes place in order that the auditor may be satisfied as to the liabilities of a limited company which are going to be stated in the balance sheet of that limited company. There is not the smallest indication in that document of any intention to put Brittain's Motors,

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Ld., into liquidation. The other document sent out is by a company which had been formed on March 2, 1933, Brittain's Garage, Ld., of which Major Jackson was also the secretary and the managing director. It is headed: "Brittain's Garage Limited"—that is to say, it is upon notepaper which appears to be theirs, and it says: "Dear Sirs. Will you please take notice that as from April 1st 1933 all orders will be in the name of Brittain's Garage Limited, 233 Preston Road, Brighton and this company will discharge the accounts of same on the due dates. Yours faithfully, per pro Brittain's Garage Limited, A. T. Jackson, Secretary." Those documents were sent out to persons whose names appeared in the sales ledger of Brittain's Motors, Ld., and, I think it right to say, possibly to other persons or firms with whom Brittain's Motors, Ld., had had business connection. Neither of them states that Brittain's Motors, Ld., was going into liquidation or had gone into liquidation, and evidence has been given on behalf of the plaintiffs, the lessors, which satisfies me that they never knew until long after the liquidation of Brittain's Motors, Ld., until long after its dissolution, which occurred at a moment to which I shall have to refer later, that Brittain's Motors, Ld., had been put into liquidation. As far as I know that advertisement in the London Gazette and those circulars were the only information given to the creditors or others of the liquidation of Brittain's Motors, Ld.

On May 27, 1933, it is said on behalf of the defendant, the final meeting of Brittain's Motors, Ld., was held, a meeting held under the provisions of s. 236 of the Companies Act, 1929. There is no record in the minute book of the meeting of the members of the company upon that day. What is recorded is a minute of the fifty-first and final meeting of the board of directors of Brittain's Motors, Ld., at which the liquidator, the defendant, is recorded as having been in attendance. But everybody has regarded that meeting as being the final meeting held in accordance with the provisions of s. 236. Thereafter, in accordance with the provisions of sub-s. 3 of s. 236, the defendant, the liquidator, sent to the Registrar of Companies an account of the winding-up, showing how the winding-up had been conducted and how the property of the company had been disposed of. The account, although no doubt one which satisfies the mind of an accountant, is more a matter of fiction than an actual matter of fact, but that does not matter for this purpose. It contains certainly a record of payments on particular dates when they never were in fact made on those dates. A particular payment of 10,000*l.* to a preference shareholder never was made by the liquidator at all. It is recorded as having been made on May 27, 1933. In fact the sum of 10,000*l.* was paid before the company went into liquidation, but the liquidator says it was necessary to put it in to make the accounts balance and so it was put in. But it appears from that account, and it is not disputed, that a return was made to the shareholders of Brittain's Motors, Ld. That account was filed on May 31, 1933, and in accordance with the provisions of sub-s. 4 within three months from the date of registration of that account the company was dissolved. That date occurred on August 31, 1933—entirely unknown to the plaintiffs.

In the meantime, in April, Mr. Kingsman, to whom the leases had been assigned in February, paid the balance of the quarter's rent due on Lady Day, 1933. The rent which fell due at Midsummer, 1933, was satisfied by the production to the plaintiffs of the receipt for income-tax under Schedule A. The rent which fell due at Michaelmas was paid by a limited company, Mann's Motors, Ld., by three instalments, and in December Mr. Kingsman assigned the premises demised by the two leases to Mann's Motors, Ld. Mann's Motors, Ld., who then became in possession by assignment of the demised premises, have been themselves unable to pay any rent, but they underlet part of the premises, and from their undertenants the plaintiffs have received three sums, each of 40*l.*, and the result is that down to March 25 of this year there is a sum of 1721*l.* 7*s.* 6*d.* due to the plaintiffs in respect of the rent of the premises comprised in the two leases. Mann's Motors, Ld., are hopelessly insolvent and are unable to pay any part of the arrears of rent.

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W. N. Stable K.C. and *C. Montgomery White* for the plaintiffs. The assets of the company have been distributed without their liability in respect of the plaintiffs' two leases having been dealt with. The liquidator is liable for damages. Not only were the leases in the hands of the directors, but they recognised that a burden was imposed on the company in respect of them.

[They referred to *Gooch* v. *London Banking Association* (1); *Pulsford* v. *Devenish* (2); *In re Windsor Steam Coal Co.* (1901), *Ld.* (3); *Lord Elphinstone* v. *Monkland Iron and Coal Co.* (4); and *In re Home and Colonial Insurance Co.* (5)]

Harold Christie K.C. and *J. G. Strangman* for the defendant. There is no case in which a company, having assigned its lease, has been prevented from distributing its assets because of any possible claim on the part of the landlord. The plaintiff must prove that he has suffered damage.

[They referred to *In re Haytor Granite Co.* (6); *In re London and Colonial Co.: Horsey's Claim* (7); *King* v. *Malcott* (8); *Smith* v. *Smith* (9); *In re Nixon, Gray* v. *Bell* (10); *In re London and Caledonian Marine Insurance Co.* (11); *Knowles* v. *Scott* (12); and *In re Hill's Waterfall Estate and Gold Mining Co.* (13)]

Bennett J. This action is perhaps not without interest either to lawyers or to laymen if they happen to be owners of land. It is the outcome of what I am quite satisfied is a deliberate attempt by a solvent company to get rid of their obligations under what they considered onerous leases, against the wishes of their landlords and without making any provision for the liabilities they might come under to them. So far as the company, who were lessees, are concerned, the attempt has proved to be successful. The question is whether the landlords can establish a liability against the defendant,

(1) (1886) 32 Ch. D. 41.
(2) [1903] 2 Ch. 625.
(3) [1929] 1 Ch. 151.
(4) (1886) 11 App. Cas. 332.
(5) [1930] 1 Ch. 102.
(6) (1865) L. R. 1 Ch. 77.
(7) (1868) L. R. 5 Eq. 561.
(8) (1852) 9 Hare, 692.
(9) (1861) 1 Dr. & Sm. 384.
(10) [1904] 1 Ch. 638.
(11) (1879) 11 Ch. D. 140.
(12) [1891] 1 Ch. 717.
(13) [1896] 1 Ch. 947.

who was the liquidator of the lessee company, and who I think was the unconscious tool of those who conceived this method of freeing the company from their liabilities.

[His Lordship then stated the facts as above set out and continued :]

All those facts are undisputed. The plaintiffs base their claim against the defendant upon the provisions of s. 247 of the Companies Act, 1929, charging the defendant with having committed a breach of the duty which that section of the Act imposes upon him. They assert that he commits a breach of his statutory duty if he distributes the property of the company amongst the members of the company without satisfying all the liabilities of the company. They say he has made distribution of the property of the company amongst the members and that he has done so without making provision for the liabilities of the company, and in particular for the liability which the company was under to the plaintiffs by virtue of the covenants contained in the two leases which were granted by the plaintiffs to Brittain's Motors, Ld., on September 28, 1925. Now, in my judgment, the matter has been decided by Pearson J. in favour of the plaintiffs, and his decision binds me. It was argued for the defendant, and this is the proposition which was asserted by Mr. Christie, that, in a case where a company, whilst still a going concern, has assigned a lease to an assignee with the licence of the landlord as required by the terms of the lease, there is nothing whatever to prevent the company from liquidating and distributing its assets to its creditors and shareholders and being dissolved in the ordinary way. Of course, if that proposition can be established, there is no liability in this case on the defendant ; but it seems to me that that proposition cannot stand with the decision of Pearson J. in the case of *Gooch* v. *London Banking Association*. (1) That was a case which was decided upon the provisions of the Companies Act, 1862, which contained, in s. 133, provisions which in all material respects are identical with the provisions to be found in s. 247 of the Companies Act, 1929, upon which the plaintiffs rely. That was a case in which the defendants, the London Banking Association, were in voluntary liquidation. They were lessees of certain premises, No. 57, Old Broad Street. The lease was at the date of the liquidation and at the date of the action vested in the defendant company. All the debts of the Association had been paid and all their liabilities satisfied except their liability for future rent under the lease, and the liquidators proposed to make a distribution of the assets of the company amongst the shareholders. The landlord brought an action for an injunction to restrain the company from distributing the assets amongst its shareholders without setting aside sufficient assets to provide for future rent and other liabilities under the lease. Pearson J. granted an injunction to restrain the liquidators from making that distribution, founding his judgment upon the provisions of s. 133 of the Companies Act, 1862. He decided, first of all, that a claim for future rent was a "liability" within the meaning of s. 133. That decision binds me to hold that the liability for future rent under the two leases with which I am concerned in this case was a "liability" within the meaning of s. 247 of the Companies Act, 1929. He next decided that for the liquidators to make a distribution amongst the shareholders whilst that liability remained would be a dereliction of their duty. That decision, as it seems to me, binds me to hold that this liquidator, in making a distribution amongst the shareholders of Brittain's Motors, Ld., was committing a breach of his duty. It also decides that the jurisdiction could be invoked at the instance of the landlord, and it seems to me that it follows from that decision that, if an injunction can be granted to restrain a liquidator from committing a breach of his duty, the liquidator who has committed a breach of his duty must be liable in an action for damages at the instance of a person who proves that he has suffered as a consequence of the breach of the duty. The plaintiffs in this case seem to me quite clearly to have proved that, if the liquidator had done his duty and kept the assets, they would have been there available to satisfy the plaintiffs' claim for rent under the leases; and, conceiving myself bound by

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(1) 32 Ch. D. 41.

Pearson J.'s decision, I feel that I have no alternative except to hold that the defendant in this case is liable to the plaintiffs for damages for breach of his statutory duty.

Mr. Christie has expressed the wish that if I came to the conclusion that the defendant was liable for damages I should not proceed to assess the amount of them and, therefore, I propose in this case to make an order declaring, in the terms of para. 1 of the prayer in the statement of claim, that in distributing the assets of the company to the members thereof without making any provision for the liabilities of the company under the two leases of September 28, 1925, the defendant acted wrongfully and in breach of his duty as liquidator of Brittain's Motors, Ld., and refer to chambers the ascertainment of such damages, ordering the defendant to pay to the plaintiffs the taxed costs of the action down to and including the date of this judgment, reserving those thereafter.

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The defendant appealed. The appeal was heard on July 18, 19 and 22, 1935.

Harold Christie K.C. and *J. G. Strangman* for the appellant.

The decision of Bennett J. was, it is submitted, wrong on the following grounds: (1.) At the time of the winding up the respondents were not creditors of the company and therefore had no right to intervene. (2.) The liquidator owed no duty to the respondents. (3.) The respondents have misconceived their remedy. The Court will not allow proceedings to be taken against a liquidator outside the winding up.

At the time of the winding up the respondents were not in a position to prove. In *In re New Oriental Bank Corporation (No. 2)* (1), it was decided by Vaughan Williams J. that the rule laid down in *Hardy* v. *Fothergill* (2) did not apply where a lessor was proving in respect of the liability of his lessee under a subsisting lease, whether the lessee was an insolvent company which was being wound up, or was a bankrupt; and that in the case of an insolvent company in liquidation *In re Haytor Granite Co.* (1) and *Horsey's Claim* (2) still applied.

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(1) [1895] 1 Ch. 753.

(2) 13 App. Cas. 351.

[Lord Hanworth M.R. The question here is whether the liquidator was right in allowing a distribution of the company's assets to take place before making provision for the respondents' debt.]

Our contention is that the claim of the respondents was not a provable debt. The Legislature imposes no obligation on the liquidator to set aside a sum to answer a contingent claim of a landlord for rent.

In re Telegraph Construction Co. (3) was not in pari materia with the present case and is therefore distinguishable.

In *Oppenheimer* v. *British and Foreign Exchange and Investment Bank* (4) there was a provision in the lease that the company should make provision for future rent: see also *Gooch* v. *London Banking Association.* (5) *In re Panther Lead Co.* (6) is also distinguishable on the facts.

This is a claim which cannot be enforced against the liquidator by an action on the case, as the Companies Act, 1929, provides for dealing with all matters arising in the liquidation: see ss. 222 and 276.

A liquidator is not strictly speaking a trustee either for the creditors or the contributories of a company in liquidation, his position being that of an agent of the company: *Knowles* v. *Scott.* (7)

[Lord Hanworth M.R. How does that case assist us? What was there held has nothing to do with the present case.]

The respondents have misconceived their remedy. Their only remedy was to apply to the Court under s. 294 of the Companies Act, 1929, and ask that the liquidation should be reopened.

In *Pulsford* v. *Devenish* (8) the judge recognized that as long as there was any remedy under the statute an action on the case could not be brought. Once there has been a liquidation the Court will not allow outside proceedings to be taken.

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(1) L. R. 1 Ch. 77.

(2) L. R. 5 Eq. 561.

(3) (1870) L. R. 10 Eq. 384.

(4) (1877) 6 Ch. D. 744.

(5) 32 Ch. D. 41.

(6) [1896] 1 Ch. 978.

(7) [1891] 1 Ch. 717.

(8) [1903] 2 Ch. 625.

W. N. Stable K.C. and *C. Montgomery White* for the respondents.

LORD HANWORTH M.R. We are prepared to hold in your favour that the judgment of Bennett J. ought to be affirmed, that the liability was one which was provable in the course of the liquidation and which ought to have been admitted to proof by the liquidator, and the liquidator ought to have taken steps to have the value of the contingent liability ascertained, and that therefore there is ground for affirming the judgment of Bennett J., who has affirmed the liability against the liquidator and ordered an inquiry as to what is the quantum of that liability. If you want to go further and to say that it is plain, quite apart from what may be revealed in the inquiry, that the amount of the rent ought to have been set aside, we should have to hear you, because we are not prepared to say that the decision in *Gooch's* case (1) would apply in all cases and that the liquidator was wrong in not setting aside sufficient assets to provide for the further rent and other liabilities. That would be a possible course; but it is not one which can be affirmed as the necessary right on the part of the landlord. It is a possible protection which could have been granted to him, but it should not be taken as an absolute right.

Montgomery White. I do not think we need carry the matter any further, because Maugham L.J. put the point that the Court in assessing the damages cannot shut its eyes to what has happened in the present case.

LORD HANWORTH M.R. That we shall certainly leave open.

LORD HANWORTH M.R. This appeal fails.

[His Lordship referred to the facts as stated by Bennett J. and continued:]

Here I will say a word as to what was the breach committed by the liquidator. I think that is clearly stated in a case before Farwell J. of *Pulsford* v. *Devenish* (2), which has now stood for over thirty-two years. There the headnote, following the judgment, correctly states: "It is the duty of a liquidator

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(1) 32 Ch. D. 41.

(2) [1903] 2 Ch. 625.

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to find out from the books and papers of the company and the statement of affairs who are the creditors of the company, and if any creditor omits to put in his claim the liquidator should communicate with him." Farwell J. held that quite clearly. He said (1): "The defendant took no steps whatever to ascertain the claims of any creditors against the old company except by inserting advertisements in six London newspapers. He knew of the existence of this claim by the plaintiffs for the payments under the licence; but he says he did not know, and I accept his statement, of the existence of the claim for the lamps. If, however, he had performed that which I consider to be the duty of a liquidator, namely, not merely to advertise for creditors, but to write to the creditors of whose existence he knows, and who do not send in claims, and ask them if they have any claim, he would undoubtedly have received a claim, not merely for the instalments payable under the licence, but also for the purchase-money of the lamps."

It appears to me quite plain in the present case that the liquidator misconceived his position, misconceived the effect of an assignment, failed to appreciate that there was this liability under these leases, the existence of which of course he knew, and that he ought to have ascertained whether there was a liability or claim which would be made by the plaintiffs.

In respect of such matters s. 261 of the Companies Act, 1929, lays it down: "In every winding up (subject in the case of insolvent companies to the application in accordance with the provisions of this Act of the law of bankruptcy) all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate being made, so far as possible, of the value of such debts or claims as may be subject to any contingency or sound only in damages, or for some other reason do not bear a certain value." In my opinion this claim by the landlords against their tenants was clearly a liability in respect of which they could have brought in a proof. It

(1) [1903] 2 Ch. 631.

was a contingent liability, for the assignees might have satisfied the liability for the rent, but it was a right which they had against the company who were their tenants under the demises and who were liable to them under the contract to pay the rent. That being so, if the liquidator had done his duty he would have seen that a claim was brought in.

Now what was the claim ? It is suggested that it was one which it was impossible to ascertain, and that under those circumstances it was so contingent that it would not be possible to put a money value upon it. To my mind the dicta in *Hardy* v. *Fothergill* (1) are directly contrary to any such suggestion. I need not refer to the various passages which were mentioned in the course of the argument, but Lord Selborne, I think, makes it quite plain that there are cases where such contingent debts are capable of valuation. He says (2) : " There may be contracts, such, for example, as a promise to marry (not broken), or a covenant not to molest, or not to carry on a particular trade within certain limits, etc. ; which on a fair interpretation of these words ought to be excluded as having a different object from the payment of money in any contingency ; although if they were broken a jury might award damages for their breach. I must guard myself against being supposed to lay down any rule applicable to cases of that kind, or to any others in which an injunction or specific performance would be the most proper remedy. But the present is not a case of that kind. A contract to indemnify against the non-performance of covenants in a lease, such as covenants to pay rent, or to keep the demised premises in repair, or to deliver them up in a proper state at the end of the term is, to all intents and purposes, 'an obligation or possibility of an obligation to pay money or money's worth' on the breach of any such covenant : it is 'an engagement to pay, or capable of resulting in payment of, money or money's worth,' if the contingency against which the indemnity is provided should occur. Unless excluded . . . . on the ground that the statute contemplates those liabilities only which are capable of being fairly valued, and that this

(1) 13 App. Cas. 351.

(2) Ibid. 360.

particular liability is not capable of being fairly valued, it is, and must be included in those words."

It is true, as Mr. Christie said, the Court were there considering words contained in a passage in a statute which does not find its place in the statute that we are considering at the present moment, but it is abundantly plain that Lord Selborne in the words which I have rather cursorily referred to intended to indicate that a contingent liability to pay rent was a contingent liability which was capable of being fairly valued. Lord Macnaghten deals with the matter in more precise terms. He says (1): "It was said that the trustee would have done a foolish thing if he had tried to estimate it, and that if he had put a value upon it, the Court on appeal must have set the estimate aside. I cannot agree in this view. A covenant such as that which has given rise to the liability as between the lessor and the lessee is not uncommon. It is not an uncommon thing for leases to be assigned, and for the assignee to undertake the assignor's liability. I cannot think that a person of practical experience in dealing with leasehold property would have any great difficulty in making a fair estimate of the value of such a liability when he was once made acquainted with the circumstances of the particular case."

It appears therefore that there was here a liability under the demise which could have been estimated and was a proper subject for estimation, and since *Hardy* v. *Fothergill* (2) one must look at such contingent liabilities as provable in a liquidation or in a bankruptcy.

Romer J., in 1896, in *In re Panther Lead Co.* (3), said (4): "Since the decision in *Hardy* v. *Fothergill* (2) the old cases as to proof by a lessor to a company in liquidation have to be reconsidered, as was pointed out by Lindley L.J. in *Craig's Claim* (5); and certainly it will be the duty of the Court to assist a lessor in proving in respect of the obligations of a company as lessee under its lease in all cases like the present where the lessor is desirous of proving at once for his loss on the footing of the lease being determined or treated as determined"—he makes observations that coincide with what I have said as to *Hardy* v. *Fothergill* (1)—" It will be the duty of the Court to assist a lessor in proving in respect of the obligations of a company as lessee under its lease in all cases like the present where the lessor is desirous of proving at once for his loss." Of course, in some of the cases, as in *Gooch* v. *London Banking Association* (2), the liability which was said to rest upon the liquidator was that he ought to have set aside sufficient assets to provide for future rent and other liabilities under the lease. That may be so in proper cases, but it does not appear that that course is one which would be followed in all cases, and the liquidator would have the opportunity of going to the Court if he was in difficulty as to what ought to be done.

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(1) 13 App. Cas. 369.

(2) Ibid. 351.

(3) [1896] 1 Ch. 978.

(4) Ibid. 985.

(5) [1895] 1 Ch. 267, 275.

Upon these facts and findings of Bennett J. it appears to me that it is quite clear that there is a liability upon the defendant in respect of his breach of duty as liquidator.

Mr. Christie argued that the plaintiffs had misconceived their remedies and that the only remedy was one under which they could have proceeded under s. 294 of the Act of 1929, which gives power to the Court to declare the dissolution of the company void. The only advantage of following that procedure apparently was to give the defendant some opportunity of raising points which but for this it would be difficult to raise at the present time. Why the plaintiffs should go to the Court and ask for a declaration that the dissolution of the company is void, I do not follow. The effect of such a declaration would be to restore the company to being, but with what result? There has been a distribution of the surplus assets to the shareholders, and a recalling of the dissolution will not give animation to the company in the sense that it will once more restore to the coffers of the company the money that has been distributed to the shareholders. I do not find any authority for saying that that remedy is the only one. The cases that we have looked at are sufficient to show that if a creditor has been injured by the failure of the liquidator to take the steps that he ought to have taken, and has suffered damage, he can " succeed in an action on the case," as Farwell J. put it, in establishing a liability against the liquidator. That being so, it appears to me that this appeal fails and must be dismissed.

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(1) 13 App. Cas. 351.

(2) 32 Ch. D. 41.

Bennett J. made an order that the following inquiry be made, that is to say, an inquiry whether the plaintiffs have sustained any and if so what damage by reason of the defendant having acted wrongfully and in breach of his duty as such liquidator as aforesaid. Mr. Strangman urged that this Court should impose some directions which would be in the nature of limitations to that order for an inquiry. I think that to do so would be unfortunate from the point of view of both parties to the action. It occurs to me that in the course of the inquiry it would be open to the defendant to show that if there had been a claim made by the plaintiffs for the rent it would have been contingent only and that at that time there was a good prospect of the liability being one remotely contingent only; and on the other hand, it would be open to the plaintiffs to show that it was not a liability remotely contingent but one which was a real liability although contingent, and to point to what I understand now is the fact, that there has been some default in the payment of rent, as showing that the amount that ought to have been allowed to proof by the plaintiffs ought not to have been merely a nominal sum but something which would be based upon the real liability of the company to pay the rent under the demises. I think therefore that the order made by Bennett J. is right and that this inquiry must proceed, and it will be possible in that inquiry for both sides to discuss the question of what ought to be the quantification of the damages, as to which I do not desire to say anything more particular.

For these reasons the appeal fails and must be dismissed with costs.

Romer L.J. I agree, and have nothing to add.

MAUGHAM L.J. In this case the plaintiffs were the lessors under two leases of September 28, 1925. The company were the lessees, and the rents payable were quite substantial in amount. The premises were situate at Brighton, and there was evidence given in the case, and in fact it appeared from the correspondence, that like many other commercial premises in these hard times they had ceased to be as valuable before the liquidation as they were at the date when they were granted. The directors of the company, who it may be mentioned included two solicitors, who were acting for the company, were very desirous of getting rid of the leases, and negotiations shortly before the liquidation were entered into for that purpose. The landlords, the plaintiffs, declined to release the company from its obligations, and by a resolution dated April 1, 1933, the company, which was perfectly solvent, went into liquidation. The defendant was appointed the liquidator ; the liquidation was conducted with extreme dispatch ; the final meeting of the company was held on May 27, 1933, not much more than a month after the date of the resolution, and the company was finally dissolved on August 31, 1933, the landlords of these large premises, which had been in the possession of the company for a considerable period till shortly before the liquidation, never having heard a word of the liquidation and not having had any communication made to them whatever in reference to the matter.

At the date of the liquidation the leases had been assigned to one Kingsman. The assignment took place in January, 1933, some three months before the liquidation. Kingsman, however, subsequently assigned the premises, with the consent of the plaintiffs, to a company, Manns Motors, Ld. We have no evidence as to what their position was at the date of the liquidation. We do, however, know that they have been unable to pay any rent since December 25 of that year, and that a large sum is now due to the plaintiffs in respect of rent. When they sought to get their rent and found that Manns Motors, Ld., the tenants in occupation, were apparently insolvent, they made an application, or sought to make an application, against the company and they then found out that it had been finally dissolved. Hence this action.

I wish to add nothing further to what the Master of the Rolls has said with regard to the negligence as to which unfortunately the defendant cannot be absolved. Bennett J. has stated the facts. The defendant apparently misunderstood the position, and he accordingly abstained from making inquiries from the directors of the company, including the solicitors of the company, which would have resulted in showing that the plaintiffs had a claim in the liquidation. There is, in my opinion, no doubt whatever that he was guilty of negligence in not making some provision for the liability of the company under the two leases in question. We have heard a long argument as to what the nature of the provision should have been. For my part I am satisfied that since the decision in *Hardy* v. *Fothergill* (1) it has been impossible to doubt but that a company in liquidation, and a fortiori a perfectly solvent company in liquidation, is bound to submit to the assessment under the Companies Act of its contingent liability to a landlord in such a case as the present, that is to say, in a case in which the company being the original lessee is no longer interested in the leases. The leases having been assigned to third parties, the question is whether the landlords are entitled, under s. 261 of the Act of 1929, to prove for the debt as one payable on a contingency or to prove as for a claim against the company, " present or future, certain or contingent, ascertained or sounding only in damages," arising by reason of the fact that the company has covenanted to pay the rent to the landlords during the continuance of the leases. I have said that in such a case as the present in my opinion there is no longer any doubt about the right of proof; but I am not forgetting that where the company is itself the tenant at the time of the liquidation considerable difficulty may arise as to what the precise right may be. Two cases in particular may arise. The liquidator may desire to surrender and the lessor may be unwilling to let him do so, or the liquidator may be unwilling to surrender though the lessor

(1) 13 App. Cas. 351.

may be willing to accept the surrender on terms as to proof or otherwise. Those circumstances do not exist here, and as a matter of fact since the Act of 1929 will less often arise—for under s. 267 of the Act of 1929, there is, what there was not previously to the Act, a right of disclaimer when a company is in liquidation.

In my opinion, in the case which we have here, where the company is no longer interested in the leases, there is no very serious difficulty in estimating the amount for which the lessors are entitled to prove; and all the Lords who sat in the important case of *Hardy* v. *Fothergill* (1) expressed, as I think, opinions which would at any rate cover this comparatively simple case. I will mention that Lord Selborne (2) referred to a dictum of Mellish L.J. in *Ex parte Waters, In re Hoyle* (3), intimating a doubt as to the right of proof in respect of the liability of a lessee who had assigned his lease under the covenants in the lease, but Lord Selborne disagreed with the expression of opinion by Mellish L.J. if he meant to intimate an opinion that the liability could never be provable in bankruptcy, and said that he was not able to find sufficient ground for it in the words of the statute before him, which was the Bankruptcy Act of 1869. (4) Other passages which have been referred to, in the speeches of Lord Halsbury and Lord Macnaghten, seem to me to show that the liability here in question was regarded as being capable of estimate; and I would add, that all the text-books, Buckley, Palmer and Stiebel, concur in thinking that since *Hardy* v. *Fothergill* (1), that has been a feasible course, at any rate in such a case as the present.

Accordingly in my opinion we have not here to consider whether the course taken in *Gooch's* case (5), and, I may add, in other cases, of declining to allow the final winding up of the company and the distribution of all its assets, without making provision for the landlord's claim under his lease was the right one. I am content to agree with the view expressed by my

(1) 13 App. Cas. 351.
(2) Ibid. 362.
(3) (1873) L. R. 8 Ch. 562.
(4) 13 App. Cas. 351, 362.
(5) 32 Ch. D. 41.

brethren that here was a claim which could properly be proved under s. 261 of the present Act.

The result is that the liquidator, acting no doubt in complete good faith but still in breach of his duty, committed a breach of the duty laid on him to pay the debts of the company. The case is exactly within the decision of Farwell J., as he then was, in *Pulsford* v. *Devenish* (1), with the result that the defendant is liable in damages to the unpaid creditors of the company whom we have before us, namely, the plaintiffs in the present action.

It has been argued that the fact that there is now a section under which the company can be restored to the register differentiates the present case from *Pulsford* v. *Devenish.* (1) I do not take that view. I think that the decision of Farwell J. that it was an absolute statutory duty on the liquidator to pay the debts out of the assets of the company remains just as valid as when he pronounced it, and that the mere fact that under some circumstances there may be a setting aside of a dissolution and the restoration of the company to the register under s. 294 does not qualify that in any way.

The amount of the damages which will be recoverable must be left at the present in doubt. There are many circumstances which we have not before us, and upon these I wish to express no opinion. I am satisfied that the judgment of the learned judge can be supported on the grounds which we have mentioned. It is true that he did not actually decide that the debt was provable and was content with the statement that the statutory duty on the liquidator had not been complied with. We have to that extent clarified the matter, but that does not affect the correctness of the inquiry which he has directed. The appeal will therefore be dismissed with costs.

Appeal dismissed. Leave to appeal to House of Lords refused.

Solicitors for appellant: *T. J. Robinson & Son.*

Solicitors for respondents: *Finnis, Downey, Linnell & Chessher.*

W. I. C.

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(1) [1903] 2 Ch. 625.

In re A DEBTOR.

C. A.

1935

Oct. 11, 25.

Ex parte DEBTOR.

[No. 490 of 1935.]

Bankruptcy—Married Woman—Carrying on a business—Series of speculative transactions—Act of Bankruptcy—Receiving Order made before passing of Law Reform (Married Women and Tortfeasors) Act, 1935*—Appeal against Order—Jurisdiction—Interpretation Act,* 1889 (52 *&* 53 *Vict. c.* 63), *s.* 38, *sub-s.* 2*—Bankruptcy Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 125*—Law Reform (Married Women and Tortfeasors) Act,* 1935 (25 *&* 26 *Geo.* 5, *c.* 30), *s.* 1 ; *s.* 4, *sub-s.* 1 (*c*) ; *Sch. II.*

By s. 125, sub-s. 1, of the Bankruptcy Act, 1914, it was provided : " Every married woman who carries on a trade or business, whether separately from her husband or not, shall be subject to the bankruptcy laws as if she were a feme sole."

By the Law Reform (Married Women and Tortfeasors) Act, 1935, which was passed on August 2, 1935, it is provided by s. 1 (*d*) that a married woman shall " be subject to the law relating to bankruptcy . . . . in all respects as if she were a feme sole ", and by Sch. II. of that Act, s. 125 of the Act of 1914 is repealed. By s. 4, sub-s. 1 : " Nothing in this Part of this Act shall . . . . (*c*) Enable any judgment or order against a married woman in respect of a contract entered into, or debt or obligation incurred before the passing of this Act, to be enforced in bankruptcy. . . . ."

The debtor, a married woman, had a series of speculative Stock Exchange transactions with the petitioning creditors extending over a period of eighteen months which resulted in a debt to them of 3500*l.*, in respect of which they obtained judgment against her. The petitioning creditors petitioned for a receiving order. The debtor disputed the petition on the ground that she was a married woman who was not carrying on a trade or business within the meaning of s. 125 of the Act of 1914. The Registrar held that the transactions in which the debtor had been engaged constituted the carrying on by her of a business within the meaning of s. 125 and made a receiving order against her. The debtor appealed. Before the hearing of the appeal the Law Reform (Married Women and Tortfeasors) Act, 1935, was passed :—

Held, that the Registrar was right in holding that the transactions in question constituted the carrying on by the debtor of a business within the section ; that it was true that an occasional speculation, even if such a speculation was repeated at intervals over a period, might not amount to " carrying on a business " for the purposes of s. 125, but, if over a considerable period such dealings were repeatedly carried on in order to make a profit and were as frequent and systematic as those in the present case, they

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might properly be held to constitute the carrying on of a business by the married woman. It was a question in each case of fact and degree.

In re a Bankruptcy Notice (1928) 44 Times L. R. 533 applied.

Held, also, having regard to s. 38, sub-s. 2, of the Interpretation Act, 1889, that inasmuch as the receiving order was made by the Registrar before the passing of the Act of 1935, it remained valid notwithstanding s. 4, sub-s. 1 (*c*), of the latter Act.

APPEAL from a receiving order made by Mr. Registrar Mellor.

The facts, which appear in the headnote, and arguments are fully stated in the judgment of Lord Wright M.R.

Gerald Gardiner for the appellant.

Tindale Davis for the respondents.

Cur. adv. vult.

1935. Oct. 25. LORD WRIGHT M.R. read the following judgment: This is an appeal by the debtor against a receiving order made by Mr. Registrar Mellor against the debtor on the petition of Drummond Power & Co., Ld.; the act of bankruptcy was failure to comply before March 6, 1935, with the requirement of a bankruptcy notice. The petition was heard on July 4, 17 and 24, 1935, on which last date the order was made. The debtor disputed the petition on the ground that she was a married woman who was not carrying on a trade or business within the meaning of s. 125, sub-s. 1, of the Bankruptcy Act, 1914, which is in the following terms: "Every married woman who carries on a trade or business, whether separately from her husband or not, shall be subject to the bankruptcy laws as if she were a feme sole."

The Registrar held that the transactions which gave rise to the debt of 3500*l.* for which the petitioning creditors had recovered judgment and in respect of which the petition was based were transactions which constituted a carrying on by her of a business within the meaning of the section. These transactions were the purchases of stocks and shares over a period of eighteen months from April, 1928. Atkinson J., who gave the judgment in the action, held that these purchases were speculative and not for investment and were made with a view to profit. The manner in which they were conducted was that the petitioners, who were general brokers, put through the dealings on the debtor's behalf on the Stock Exchange, lending her the necessary money. They recommended the purchases and sales: she was credited with dividends which accrued on the shares, and with prices realized on sales, and she was debited with losses on sales: regular accounts were sent to her after each transaction and were approved by her. Eventually the market having proved adverse, it became no longer possible to hold the shares, which were accordingly sold at a loss of 3500*l.* This constituted the petitioners' debt.

Though the transactions were speculative, they were genuine mercantile dealings carried out by purchase and sale on the Stock Exchange in the ordinary way. I think the Registrar was right in holding that these dealings constituted a business carried on by the debtor. There is no definition of "business" in the Bankruptcy Acts; it is a word of wider import than "trade" which in the earlier Act was the only word used. The word "business" was added in order to widen the scope of the section. In this sense Scrutton J. said in *In re a Debtor* (1): "I cannot agree with the Registrar that the two words 'trade' and 'business' mean the same thing. Originally a married woman could only be made liable if she was trading separately from her husband, but now she is liable whether she is trading separately from him or not. The word 'trade' is often confined to buying and selling commodities. Where to draw the line between what is a profession and what is a trade is a matter which it is not possible to deal with by any general definition. 'Business' is a much wider term than 'trade.' The word 'business' at least covers a continuous occupation involving liabilities to others, and it is difficult to see the reason why a married woman should not be liable to the ordinary consequences of the bankruptcy laws if she incurs liabilities and does not meet them." A case closely parallel to the present is *In re a Bankruptcy Notice* (2), in which Lord Hanworth M.R. said, in respect of a series of speculative transactions in exchange differences but carried

(1) [1927] 1 Ch. 97, 105.

(2) 44 Times L. R. 533, 534.

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out by real commercial contracts, that it was not necessary to discuss the exact meaning of the words "trade" or "business." In the case of *In re a Debtor* (No. 3 of 1926) (1) he had called attention to the fact that in recent statutes the word "business" had been added to "trade" to enlarge the sphere of responsibility of a married woman. He could not agree that the transactions there must be treated as speculations and nothing more. In *Cooper* v. *Stubbs* (2) he had said that the speculative nature of a transaction might be one of the material facts to be considered; but, although speculative, a transaction might none the less be a real business transaction. The simple consideration of the matter led to this: that when the Court found a series of operations involving the making of a number of genuine commercial contracts extending over a long period of time, that series of transactions might well be said to be the carrying on of a business. What Lord Hanworth said there can, in my opinion, be properly applied to the present case. It is true that an occasional speculation, even if such a transaction is repeated at intervals over a period, may not amount to a carrying on of business for the purposes of the section, but, if over a considerable period, such dealings are repeatedly carried on in order to make a profit and are as frequent and systematic as in this case, they may properly be held to constitute a carrying on of business by the married woman. It is a question in each case of fact and degree. The accounts have been produced and fully justify, in my opinion, the Registrar's finding that the debtor was carrying on a business.

A further point has, however, been raised on the debtor's behalf. On August 2, 1935, the Law Reform (Married Women and Tortfeasors) Act, 1935, was passed. Sect. 1 of that Act provides: "Subject to the provisions of this Part of this Act . . . . a married woman shall . . . . (*d*) be subject to the law relating to bankruptcy . . . . in all respects as if she were a feme sole." By the Second Schedule, s. 125 of the Bankruptcy Act, 1914, was repealed, and s. 4, sub-s. 1, of the Act of 1935, contains the following provision: "Nothing in this Part of this Act shall . . . . (*c*) enable any judgment or order against a married woman in respect of a contract entered into, or debt or obligation incurred, before the passing of this Act, to be enforced in bankruptcy. . . . ."

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(1) [1927] 1 Ch. 97.

(2) [1925] 2 K. B. 753.

It was contended that although in July last, when the Registrar made the order, s. 125 was unrepealed, yet when the appeal came before the Court of Appeal, that section was repealed and therefore there was no jurisdiction to make the order, because this Court must act in accordance with the law existing at the date of the appeal. It is urged also that not only must regard be had to s. 4, sub-s. 1 (*c*), of the Act of 1935, but also that that Act contains no savings.

In my opinion there is no foundation for that contention. Sect. 4, sub-s. 1 (*c*), is purely negative and leaves the enumerated matters to be dealt with by the law as it existed before the Act. It is true that there are no express savings in the Act of 1935 : but that is not necessary since the Interpretation Act, 1889. That Act was passed to simplify the work of drafting Acts of Parliament and to shorten them by enacting in general form certain standard provisions which should apply under every Act subsequently passed, except where any particular Act contained provisions to the contrary. Sect. 38, sub-s. 2, reads as follows : " Where this Act or any Act passed after the commencement of this Act repeals any other enactment then . . . . the repeal shall not (*a*) revive anything not in force or existing at the time at which the repeal takes effect ; or, (*b*) affect the previous operation of any enactment so repealed or anything duly done or suffered under any enactment so repealed ; or, (*c*) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed." In my opinion that sub-section has the effect of saving every liability which attached to a debtor to be adjudicated bankrupt or to have a receiving order made against him and all rights of a creditor to claim a receiving order and an adjudication in bankruptcy in proper cases. This would be so where there was an available act of bankruptcy before the passing of

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the Act of 1935: but it is a fortiori so in the present case where the receiving order was made before the Act of 1935 was passed, and what is now in issue is merely an appeal against that order. The meaning of a "right accrued" under the Interpretation Act, 1889, s. 38, sub-s. 2, is illustrated by *Hamilton Gell* v. *White* (1), where it was held that a tenant had acquired a right to compensation under s. 11 of the Agricultural Holdings Act, 1908, as soon as he received notice to quit, though he took no proceedings till after the Act was repealed. Atkin L.J. there said (2): "It is obvious that that provision was not intended to preserve the abstract rights conferred by the repealed Act, such for instance as the right of compensation for disturbance conferred upon tenants generally under the Act of 1908, for if it were the repealing Act would be altogether inoperative. It only applies to the specific rights given to an individual upon the happening of one or other of the events specified in the statute. Here the necessary event has happened, because the tenant has 'acquired a right,' which would 'accrue' when he quitted his holding, to receive compensation."

The same reasoning would, I think, justify the Court in proceeding under s. 125 of the Bankruptcy Act, 1914, even though the bankruptcy proceedings were not commenced until after the Act of 1935 came into operation so long as the act of bankruptcy was anterior to that Act.

Counsel for the debtor relied on *Quilter* v. *Mapleson.* (3) That however was a case merely dealing with matters of procedure or remedies to which a different rule applies. It is not necessary to quote any authority for that distinction save what was said by Jessel M.R. in *In re Joseph Suche & Co.* (4): "It is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. It is said that there is one exception to that rule, namely, that, where enactments merely affect procedure and do not extend to

(1) [1922] 2 K. B. 422.
(2) Ibid. 431.
(3) (1882) 9 Q. B. D. 672.
(4) (1875) 1 Ch. D. 48, 50.

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rights of action, they have been held to apply to existing rights, and it is suggested here that the alteration made by this section [i.e., s. 10 of the Judicature Act, 1875] is within that exception. I am of opinion that it is not. This is an alteration not merely in procedure, but in the right to prove for a debt which is not distinguishable in substance from a right of action before winding up, being simply a legal proceeding to recover a debt against a company in liquidation." And further by serving the bankruptcy notice the creditor has done an act towards availing himself of the right given by the repealed section which was the case put by the Judicial Committee in *Abbott* v. *Minister for Lands* (1), as one to which s. 38, sub-s. 2, of the Interpretation Act, 1889, would apply.

Thus while an Appellate Court is able, and bound, to give effect to new remedies which have been introduced by enactments passed after the order appealed from was made by the Court of First Instance, yet with regard to substantive rights it is well established that the Appellate Court must give effect to the same law as that which was in force at the date of the earlier proceeding. That is recognized by Order LVIII., r. 4, which provides that even in cases where the proceeding in the Appeal Court is a rehearing, " the Court of Appeal shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been made." A matter of substantive right which has become res judicata cannot be upset by a subsequent general change of the law, in the absence of precise intention to make the change so retrospective being evidenced in the Act.

In any case, however, the operation of the earlier law is preserved in this matter by the section of the Interpretation Act, 1889, which I have cited.

The appeal fails and must be dismissed with costs.

ROMER L.J. I have had an opportunity of reading the judgment of the Master of the Rolls and I agree with his reasoning and his conclusions.

(1) [1895] A. C. 425.

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LORD WRIGHT M.R. Eve J. has authorized me to say that he also agrees with the judgment.

Appeal dismissed.

Solicitors for appellant: *Wilkinson, Bowen, Haslip & Jackson.*

Solicitors for respondents: *Montagu's and Cox & Cardale, for Bremner, Sons & Corlett, Liverpool.*

W. I. C.

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Company—Articles of Association—Directors—Retirement at annual meeting—Proportion of "whole number of directors to retire"—Additional directors not to be taken into account—Provision for determination by "ballot" of directors to retire—Meaning of "ballot."

Art. 85 of a company's articles of association provides that "at the ordinary meeting in 1925 and every subsequent year, one-third, or the nearest number next below one-third, of the whole number of directors shall retire from office" that a retiring director is to be eligible for re-election at the meeting at which he retires and shall act as director throughout that meeting, and that the directors to retire in 1925, "unless the directors agree among themselves, shall be determined by ballot" and those to retire in every subsequent year "shall be those who have been longest in office since their last election and when two or more of such directors shall have served for an equal period, then their retirement shall be determined by ballot."

In 1935 the board consisted of the chairman and seven other directors. Of these the managing director was by art. 101 not liable to retire by rotation or be taken into account in determining the rotation of retirement, and two others were additional directors appointed under art. 90, which provided that any additional director should hold office "only until the next following ordinary general meeting of the company." No question arose as to the first director to retire, but if a second director had to retire a selection had to be made between the plaintiff and the chairman who had held office as directors for an equal period:—

Held, by the Court of Appeal: (1.) that the words "by ballot" in art. 85 meant "by lot"; and (2.) that "the whole number of directors" under art. 85 of whom a proportion was to retire did not include the additional directors, who by art. 90 only held office until the ordinary general meeting, seeing that the directors to retire fell by art. 85 to be determined at that meeting. It followed that one director only had to retire.

Decision of Eve J. on the first point reversed.

MOTION.

The defendant company, Milton Proprietary, Ld., was formed in 1923. The plaintiff was one of its directors and the defendant Henry Smith Clough was the chairman of directors.

Art. 85 of the Articles of Association provided as follows: "At the ordinary meeting in the year 1925 and in every subsequent year, one-third, or the nearest number next below one-third, of the whole number of directors, shall retire from office, and the meeting shall elect qualified members in their place. A retiring director shall be eligible for re-election at the meeting at which he retires and shall act as a director throughout that meeting. The directors to retire in the year 1925, unless the directors agree among themselves, shall be determined by ballot. In every subsequent year the directors to retire shall be those who have been longest in office since their last election, and when two or more of such directors shall have served for an equal period, then their retirement shall be determined by ballot."

By art. 90: "The Board may from time to time appoint additional directors, but so that the total number of directors shall not exceed the prescribed maximum, but any director so appointed shall hold office only until the next following ordinary general meeting of the company, and shall then be eligible for re-election."

The plaintiff, Professor J. W. H. Eyre, M.D., was a professor of bacteriology, and in 1932 was invited by reason of his technical knowledge to join the board of the company, which manufactured disinfectant preparations. Both the plaintiff and the defendant Clough were originally appointed as additional directors under art. 90, but afterwards re-elected as ordinary directors.

In 1935 the board of directors consisted of the chairman and seven other directors, of whom two were additional directors and one the managing director who by art. 101 was not liable to retire by rotation or to be taken into account in determining the rotation of retirement of directors. At the annual general meeting to be held on December 19, 1935, it was intended to propose that two directors should retire, and that these two should be Mr. William Knox, who had been a director longer than any other, and either the plaintiff or the defendant Clough, whose services as directors were of equal duration. At a board meeting on November 21 the defendant Clough as chairman asked the plaintiff to sign and hand in his resignation, and as he refused to do so then stated that he would take other steps to get rid of him.

At a meeting of directors held on December 5 the question which of these two directors should retire at the annual meeting was put. The plaintiff and two other directors, including the managing director, refused to vote, contending that the question should be determined by drawing lots. The chairman and the other four directors voted for the retirement of the plaintiff, and the chairman declared the resolution carried.

The plaintiff then brought this action against the company and the defendant Clough, and moved therein for an order restraining the defendant company from stating in the notice convening its ordinary general meeting about to be convened or in any report accompanying such notice that the plaintiff and not the defendant Clough was one of the directors retiring by rotation, unless and until the question which of them was the director so retiring should have been determined by drawing of lots and also restraining the defendant Clough, as chairman, from submitting and the defendant company from passing at such ordinary general meeting any resolution appointing or purporting to appoint any other person to be a director in the place of the plaintiff, as being the director retiring by rotation at such meeting, unless the plaintiff should first have been selected as the director to retire thereat by a drawing of lots.

Gover K.C. and *Gordon Brown* for the plaintiff.

Cyril Radcliffe K.C. and *Heckscher* for the defendants.

EVE J. This is a very short point. In my opinion, art. 85

indicates first that certain things are to be done if the directors are unanimous. That is to say, if there is no difference of opinion amongst them certain things will be done as prescribed in the first part of the clause. If they do not agree, I am of the opinion that the point in dispute is to be submitted to a secret vote, where the names of the directors voting are concealed from the individuals who are ultimately to be turned out.

I think in this case, therefore, the article confines the determination to the directors, and the particular directors to retire must be selected by secret vote of the whole body of directors.

There will be no order on the motion, except that costs will be costs in the action.

H. L. L.

C. A.

The plaintiff appealed. The appeal was heard on December 18, 1935.

Hon. Sir Stafford Cripps K.C. and *Gordon Brown* for the appellant. There were only five material directors left at the date of the meeting. The initial words of art. 85 "at the ordinary meeting" make it clear that this is the time when the director or directors to retire falls to be ascertained. The two additional directors appointed by the board during the year in question under art. 90 were by virtue of that article only to hold office "until the next following ordinary general meeting" so that they ceased to be directors before the question of the retirement of directors arose "at the ordinary meeting." The result is that instead of there being seven directors for the purpose of art. 85 there were only five, with the result that only one director became liable to retire, who is admittedly Mr. Knox.

If, however, this contention is not accepted so that there were seven directors at the material time and two directors had to retire, the second director should be ascertained by lot under art. 85. Eve J. construed art. 85 as meaning that the director to retire was to be chosen by the vote of the directors, but that is not the correct construction of the words "by ballot," for the article does not say by whose vote the director

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was to be chosen, and Eve J. had to draw an inference that it was the directors, for which it is contended that there is little justification. Ballot is only to be resorted to if the directors cannot come to an agreement, and in those circumstances it would seem more reasonable to ascertain the director by lot than to take a vote of the very persons who are unable to agree. Further, no provision is made for the eventuality of the votes being equal, and in that case there would be a deadlock.

It is true that ballot is used in both senses, but for the reasons already given in the construction of art. 85 the meaning " lot " is to be preferred. In regard to companies, the word " ballot " first occurs in the Companies Clauses (Consolidation) Act, 1845, s. 88, which provides that the directors appointed under the special Act are to retire in certain proportions : " the individuals to retire being in each instance determined by ballot among the directors." Art. 59 of Table A to the Companies Act, 1862, provided that the directors to retire " shall, unless the directors agree among themselves, be determined by ballot." In 1906 the Board of Trade altered the Table and altered the word " ballot " in this article to " lot." The word " lot " appeared in Table A to the Companies (Consolidation) Act, 1908, and now appears in the Companies Act, 1929, Table A, Art. 74. It is contended that the change of word did not alter the sense but merely removed any possible doubt. Other Acts which make provision for choice of persons by ballot are the Militia Acts and the Building Societies Act, 1874, s. 34. The word " ballot " was used in *In re Tewkesbury Gas Co.* (1) in regard to the repayment of debentures, but the context made it clear that a drawing by lot of debentures for repayment was intended. It is the context which is relied on here to show that " ballot " in art. 85 meant " lot."

Cyril Radcliffe K.C. and *Heckscher* for the defendants. There is no justification for saying only one director is to retire. It is true that there is in art. 90 no provision that the additional directors are to act as directors during the meeting, as there is in art. 85 in regard to the retiring directors; but on the other hand there is no provision excluding the additional directors from being taken into account as there is in art. 101 in regard to the managing director. Further, at all relevant times for ascertaining the number of directors to retire the additional directors are just as much directors as any one else. The retiring directors must be ascertained before the ordinary meeting, so that proper notice may be sent out: see art. 61. There is no express provision in art. 85 saying when the number of directors to retire is to be ascertained.

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(1) [1911] 2 Ch. 279.

[ROMER L.J. There are the introductory words "at the ordinary meeting."]

There is really no difference between the position of the additional directors and the retiring directors for this purpose. In both cases the retirement takes place at the commencement of the meeting. Special stress is laid on the difference of the position of the additional directors and the managing director as showing that the additional directors are included in "the whole number of directors."

As regards the meaning of "ballot" no assistance is to be obtained from the Militia Acts or the Building Societies Act, as the subject-matters dealt with in those Acts are so different. It is admitted that the words "by ballot" are capable either of meaning "by vote" or "by lot." But it is material to note that "by ballot" was the expression used in the article, although long before that the expression in the corresponding article in Table A had been altered to "by lot." The alteration made to "by lot" in Table A was made by an order of the Board of Trade under s. 71 of the Companies Act, 1862, which empowers the Board to make such alterations or additions to Table A as it deemed requisite. The fair inference is that the change of the word "ballot" to "lot" involved an alteration in meaning which was not adopted in art. 85. In art. 85 an emergency provision is being made for when a director to retire has to be selected from directors who have held office for an equally long time. It is the sort of matter which would normally be determined by the board of directors; further the fair inference from the fact that in 1925 the directors to retire

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were to be elected by ballot, in case the directors did not agree among themselves, showed that a ballot of the directors was in contemplation, and ballot in the later part of the article must bear the same meaning. The object is to insure secret voting. It is not the function of the general meeting to determine who is to retire.

Hon. Sir Stafford Cripps K.C. replied.

LORD WRIGHT M.R. This is an interlocutory appeal from an order of Eve J., and it raises a point of some interest and difficulty under the articles of association of this company. The facts are very simple, and they are set out in an affidavit of the plaintiff. He is a director of the company and he was elected in the month of February, 1934, and the question has arisen whether he is under the articles of association and on the facts of the case a retiring director at the end of the current year. The articles of association provide for a certain number of directors. They are at present six in number, the chairman and five others, and there are in addition two other directors, who are called additional directors. The article in question is art. 85, and is in these terms. [His Lordship read the article.] The points which arise on the construction of that article are two. One point was not taken before Eve J. and it is taken now for the first time, and that turns on what is meant by " the whole number of directors," one-third of whom, or the nearest number next below one-third of whom, are to retire from office in the manner prescribed by the article. The second point is what is meant by the word " ballot " if there are two or more directors to whom the article would apply in the absence of a determination as to who is to retire.

The position here is that the plaintiff and the chairman are both prima facie liable to retire under this article, if the number of directors who, under art. 85, are to retire from office in the current year are two. If, on the other hand, the number of directors who, under art. 85, have to retire is not two but one, then that one will be Mr. Knox, and no question will arise between the plaintiff and chairman. The directors are contemplating deciding the matter on the footing that there are two directors to retire, of whom Mr. Knox is one and the other is the plaintiff or Mr. Clough, and they are proceeding to determine which of these two is to retire by a secret vote, because that is the meaning which they attach to the word " ballot." That gives rise to the second question on which Eve J. gave his decision. He held that the word " ballot " meant a secret vote, whereas it is now contended, as it was contended before him, on behalf of the plaintiff, that it means not a secret vote but a drawing by lot. Both these questions, as I say, are questions of some nicety, and either of them if answered in favour of the plaintiff would be decisive of this appeal; but I think it better, as both points have been argued, to deal with both of them, especially as the first point was not before the learned judge.

As to the second point, which is the point of more general interest, that is to say, whether the word " ballot " means a secret vote or a drawing by lot, the word itself is clearly capable of either meaning. After hearing the references to the history of this word in the course of company legislation and also after being referred to other Acts in which the word has been used, the first conclusion at which I arrive is that the meaning of the word must be determined, wherever a company is using a set of articles of its own instead of Table A, by the construction of the particular articles as a whole. We have been referred to the Building Societies Act, 1874, and to the Militia Acts. I do not deal with them, because they relate to an entirely different subject-matter from that which has to be dealt with now. We have also been referred to the Companies Clauses Consolidation Act, 1845, where the word " ballot " was used in s. 88. It provides there: " The Directors appointed by the special Act "—and others appointed in their place—" shall . . . . retire from office at the times and in the proportions following, the individuals to retire being in each instance determined by ballot among the Directors," so that the use of the word " ballot " in this connection starts at a very early period of company legislation. In Table A in the Act of 1862 there is a very similar provision in art. 59: " The one-third or other nearest number to retire during the first and second years ensuing the first ordinary meeting of the company shall, unless the directors agree among themselves, be determined by ballot: in every subsequent year the one-third or other nearest number who have been longest in office shall retire." That is very similar in effect and in language to the article here. In 1906 the Board of Trade, acting under the powers given to them by the Act of 1862 to alter the Tables, altered among other things the language of that article, substituting the word "lot" for the word "ballot" and that term has since been used in the Companies Acts and now appears in art. 74 of Table A scheduled to the Companies Act, 1929: "The directors to retire in every year shall be those who have been longest in office since their last election but as between persons who became directors on the same day those to retire shall (unless they otherwise agree among themselves) be determined by lot."

The word "ballot" clearly may cover a case in which the decision depends on chance or is made by lot. We have been referred to *In re Tewkesbury Gas Co.* (1) The language to be construed there, which I imagine is quite usual, was in a debenture, and it provided: "The debentures to be paid off will be determined by ballot, and six calendar months' notice will be given by the company of the debentures drawn for payment," so that there the word is clearly used, as it well may be used, in the sense of the process in which a number of little balls or pieces of paper are put into some receptacle and mixed up and a drawing then made. The result then is, of course, a matter of chance. But the word "ballot" has undoubtedly been used in other circumstances to indicate a secret vote. When I look at the language of art. 85 in this case and consider the circumstances, the view at which I arrive is that the proper construction of the words "by ballot" is "by lot." No doubt it is purely an administrative matter for the directors to ascertain in case of doubt or conflict which of the possible directors is to retire at any particular time, but art. 85 contains no provision at all as to who is to determine the ballot, if by "ballot" is meant a vote. It is perfectly true that it might be implied that the persons to ballot must be the directors, but on the other hand, if the matter is to be determined by a vote of the directors, whether secret or not, it is clear that very serious administrative difficulties might arise. There might, for instance, be an equality of votes, and then there is no provision at all for any one to give the casting vote. There would be an absolute impasse without any provision being made in the articles to meet it. That difficulty is peculiarly illustrated by the provision relating to the year 1925. It is provided that the directors, who shall retire in the year 1925, unless the directors agree among themselves, shall be determined by ballot. If in such a case "ballot" means a secret vote, there has been a failure to agree and that failure may be reproduced in the secret vote and, as I have said, nobody would be able to settle the difficulty in the case of an equality of votes. As I read these words, they presuppose first an attempt among the directors to agree, and then the determination of the question who is to retire by something other than the agreement or the choice of the directors, and that can only be by a decision by lot. In every subsequent year the same sort of thing is to happen though in a somewhat different way. It has first to be ascertained who of the directors have been longest in office since their last election. If there are two or more who have served for an equal period, then their retirement is to be determined by ballot. Although the language is capable in the abstract of either of the two meanings already mentioned, I think that when regard is had to the precise terms used and to the practical advantages of the one interpretation, as contrasted with the other, of the word "ballot," the right one is the word "lot."

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(1) [1911] 2 Ch. 279.

The other point, as I have said, is what is meant by the words "of the whole number of directors" in art. 85, because it is essential to ascertain that in order to determine what is the number of directors who have to retire in any particular year. On the one side it is contended that the number of directors constituting the whole number for this purpose is seven; that is the defendants' contention. On the part of the

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plaintiff it is contended that " the whole number of directors " is not seven, but five. On the former view the number of retiring directors would be two ; and on the latter view one. It is clear that the total number of directors for this purpose does not include the managing director. That is expressly provided in art. 101, which says : " A managing director shall not, while he continues to hold that office, be subject to retire by rotation, and he shall not be taken into account in determining the rotation of retirement of directors." That reduces the possible number to seven or five. The question whether seven or five is the correct number is to be ascertained by taking into consideration the terms of art. 90, which provides : " The Board may from time to time appoint additional directors . . . . but any director so appointed shall hold office only until the next following ordinary general meeting of the company, and shall then be eligible for re-election." The point under consideration depends for its answer on the introductory words of art. 85 as compared with the words of art. 90, and also on certain later words of art. 85. There must be some point of time at which it falls to be ascertained who are " the whole number of directors " to whom must be applied the provision relating to retirement, and the time is to be " at the ordinary general meeting." But at the ordinary general meeting it is clear under art. 90 that the two additional directors will not be in office. They are to hold office " only until the next following ordinary general meeting of the company," so that at the moment when the next following ordinary general meeting of the company begins they are no longer in office, whereas the other five directors, whether retiring or not, are to act as directors throughout the meeting. There is no express provision as in art. 90 that their office is to continue only until—that is to cease just before—the ordinary general meeting. It follows that, in my opinion, at the critical time, which is the commencement of the ordinary general meeting, the number of directors to be considered is the number of directors exclusive not only of the managing director but also of the two additional directors. That being so, the number to be considered is only five and

" one-third, or the nearest number next below one-third " of five is obviously one, and it is not disputed that if there is only one director who, under the articles, is to retire, that director is Mr. Knox and not the plaintiff.

On both these grounds, therefore, the appeal should in my judgment be allowed.

ROMER L.J. The position when this motion came before Eve J. was thought to be that Mr. Knox, who had been the longest in office, was due to retire, but that the plaintiff and Mr. Clough, who had been an equal time in office, were not both to retire, but only one of them. The dispute between the parties was whether it was Mr. Clough or the plaintiff who should join Mr. Knox in retiring. Accordingly, the notice of motion before Eve J. was in these terms: " Take notice that this Honourable Court will be moved . . . . for an order restraining the defendant company from stating in the notice convening its ordinary general meeting about to be convened or in any report accompanying such notice that the plaintiff and not the defendant Clough is one of the directors retiring by rotation, unless and until the question which of them is the director so retiring shall have been determined by drawing of lots and also restraining the defendant Clough, as chairman, from submitting and the defendant company from passing at such ordinary general meeting any resolution appointing or purporting to appoint any other person to be a director in the place of the plaintiff, as being the director retiring by rotation at such meeting, unless the plaintiff shall first have been selected as the director to retire thereat by a drawing of lots." When the matter came before us, however, the plaintiff had thought the matter over further with his advisers, and had come to the conclusion that it was possible that neither he nor Mr. Clough would have to retire at the ordinary general meeting. Accordingly, the notice of appeal asks, in the first place, for an injunction " restraining the defendant Clough as chairman of the defendant company from submitting, and the defendant company from passing, until after judgment in this action or further order, at the ordinary general meeting of the defendant company convened for the 19th December, 1935, or at any adjournment thereof any resolution appointing or purporting to appoint any other person to be a director in the place of the plaintiff, as being a director retiring by rotation at such meeting" ; and he only asks in the alternative for the relief that he had asked for before Eve J., so that if he be right in the point with which the Master of the Rolls has just dealt, relief must be given in accordance with the first part of the notice of appeal. If, however, he be wrong on that point, but right on the first point with which the Master of the Rolls dealt in his judgment, then the plaintiff would be entitled to the alternative relief that he asks for in the notice of appeal.

I have come to the same conclusion as that to which the Master of the Rolls has come upon both those points. Art. 85 provides as follows in the last sentence of the article : "In every subsequent year the directors to retire shall be those who have been longest in office since their last election, and when two or more of such directors shall have served for an equal period, then their retirement shall be determined by ballot." "Subsequent year" means subsequent to the year 1925, and if those words had not been preceded by a sentence which I will read in a moment, I do not think that any one would have suggested, or at any rate could have suggested with any chance of success, that "ballot" there meant a secret vote, because the secret voters are not determined. Nothing is said as to whether the secret voters are to be the two or more directors who have been an equal time in office or the whole body of directors, or the whole body of directors excluding the two or more who have been longest in office, or the shareholders of the company in general meeting. In these circumstances, it would, it seems to me, have been impossible to think that the words "by ballot" there meant anything more than by lot but for the words preceding the sentence with which we have to deal in this case. These words are : "The directors to retire in the year 1925, unless the directors agree among themselves, shall be determined by ballot." Eve J. thought that the words "unless the directors agree among themselves,"

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were sufficient to show that the ballot was to be a ballot amongst the directors themselves, the people who had been unable to agree. In his judgment he said: "In my opinion article 85 indicates first that certain things are to be done if the directors are unanimous. That is to say, if there is no difference of opinion amongst them, certain things will be done as prescribed in the first part of the clause. If they do not agree, I am of the opinion that the point in dispute is to be submitted to a secret vote, where the names of the directors voting are concealed from the individuals who are ultimately to be turned out." That, of course, was construing the sentence that I have just now read, and if in that sentence the word "ballot" meant a secret vote, of course "ballot" in the last sentence of art. 85 must, in accordance with the ordinary rules of construction, be given the same meaning; but with the greatest deference to Eve J., I am unable to arrive at the conclusion that by the use of those words, "unless the directors agree among themselves," the parties to the articles of association have shown that by "ballot" they meant a secret vote amongst the directors themselves. I confess that the words "unless the directors agree among themselves" have just the opposite effect on my own mind. They strongly suggest to me that if the directors cannot agree, then the directors are to have nothing more to do with the matter at all, and it is then to be determined by chance.

Upon the other question which has been raised for the first time in this Court, I have nothing to add to what the Master of the Rolls has said. I agree that in the circumstances the number of directors to be considered is the number of directors existing at the moment when the ordinary general meeting begins, and inasmuch as at the particular moment that it begins the two directors elected under art. 90 cease to be directors, the number of directors then must be taken to be five and not seven.

GREENE L.J. I agree on both points. With regard to the point that was first argued before us, it appears to me that arts. 85 and 90 show a clear distinction in the status of

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additional directors appointed under art. 90, and directors who retire by rotation under art. 85 at the relevant moment. The status of those appointed under art. 90 when the ordinary general meeting opens is that they are not directors. On the other hand, at the moment when the meeting opens a director retiring by rotation is entitled to be present in his capacity as director, notwithstanding that he is to retire, and may retire, at the next moment.

On the second point, the argument is that " ballot " must mean a vote by a constituency which consists only of the directors. I should have thought myself that if the word " ballot " was intended to imply a vote, the constituency to be considered would be the constituency of the members of the company present at the meeting rather than the board alone. It is at the meeting that the retirement is to take place, and if that retirement was to be decided by a vote I should have thought that, on the language used, the persons to vote would have been the shareholders. It is, to my mind, impossible to suppose that a matter of that importance would have been left in doubt, and this, to say the least of it, would be the result on the construction submitted by the company. I further call attention to the fact, that admittedly the construction contended for by the company might, in circumstances which might very easily occur, lead to an impasse. In construing a document of this kind, which is intended to provide for the smooth and effective running of the machinery of the company, I think that it is legitimate to rely, and to lay stress, upon that matter. It is also right, I think, to point out that according to the respondents' argument, from the year 1862 down to the year 1906, all companies which had adopted Table A, or that part of Table A which referred to this matter—and there were certainly many of them—were, whenever this occasion arose, deciding the question by a vote. In view of the fact that an impasse is a thing which would be quite likely to arise, it is difficult for me to believe that companies in all those years, if they were deciding this matter by vote, would not have found themselves, sooner or later, in a state of impasse which would have involved some person bringing the matter before the Courts. It is further to be observed that, so far as I have been able to discover, no text-book writer on the matter appears to attach any significance to the change in language which was introduced in 1906, and had the change in language in Table A had the important result which is suggested I cannot myself think that it would have escaped attention. The real fact of the matter is, in my opinion, that when in Table A of the original Companies Act, 1862, the word "ballot" was used it was used in the sense of the word "lot," and the change introduced in 1906 was not a change in the meaning of the article, but a change in language in order to preclude any possibility of doubt as to what was intended by the Legislature.

Appeal allowed.

Solicitors: *Willis & Willis* for the plaintiff; *Mayo, Elder & Rutherfords* for defendants.

H. C. G.

FARWELL J.
1935
Oct. 15.

In re HEATH.

PUBLIC TRUSTEE *v.* HEATH.

[1935. H. 1897.]

Will—Construction—Gift of personalty to legatee if she should attain 21 or marry, followed by gift over if she should die unmarried under the age of 21 years—Vested legacy, subject to be divested in the event mentioned.

By his will the testator gave 5000*l.* to E. L. H. if she should be living at the date of the death of the survivor of himself and his wife and should attain the age of 21 years or marry under that age, and proceeded: "In case the said E. L. H. predecease me or shall survive me but shall not attain the age of 21 years or marry under that age, then . . . . I give the said legacy of 5000*l.* to L. K. B." E. L. H. survived the testator and his wife, but was under the age of 21 years and unmarried:—

Held, that E. L. H. took a vested interest, subject to be divested in the event mentioned.

The rule in *Phipps* v. *Ackers* (1842) 9 Cl. & F. 583 applied to a gift of pure personalty.

ADJOURNED SUMMONS.

The testator by his will, dated February 8, 1929, appointed executors and trustees and after bequeathing certain specific and pecuniary legacies, he devised and bequeathed all his real and personal property not otherwise disposed of to his trustees upon trust for sale and conversion and to invest the net proceeds and stand possessed of the investments thereof (thereinafter called the residuary trust funds) upon trust to pay the income thereof to his wife during her life. Clause 10 of the will provided that: "From and after the decease of the survivor of me and my wife, I direct my trustees to raise out of the residuary trust funds and pay the following sums free of duty:—

"(2.) The sum of 5000*l.* to my granddaughter, Elizabeth Lorna Heath if she shall be living at the date of the death of the survivor of myself and my wife and shall attain the age of 21 years or marry under that age. In case the said Elizabeth Lorna Heath shall predecease me or shall survive me, but shall not attain the age of 21 years or marry under that age, then . . . . I give the said legacy of 5000*l.* to Lorna Keell Baynes."

By a codicil, dated August 18, 1931, the testator appointed the Public Trustee in place of the trustees appointed by his will, one of whom had died. The testator died on July 4, 1934, his wife having predeceased him. The defendant, Elizabeth Lorna Heath, to whom the testator did not stand in loco parentis, was a spinster of the age of 19 years.

This summons raised the question whether the gift of 5000*l.* to the defendant, E. L. Heath, was a contingent legacy or a vested legacy, subject to be divested on her dying a spinster under the age of 21 years.

A. P. Vanneck for plaintiff.

H. A. Rose for E. L. Heath. The legacy of 5000*l.* is a vested legacy, subject to being divested if the legatee dies under the age of 21 years. This would undoubtedly be so if it were a devise of real estate: *Phipps* v. *Ackers.* (1) The rule is laid down in Hawkins on Wills, p. 286, and Mr. Hawkins states that: "The rule applies to devises by way of executory trust." The rule is referred to in Jarman on Wills, 7th ed., pp. 1349 and 1350. It has been applied in gifts of mixed realty and personalty: *Whitter* v. *Bremridge* (1) and *Finch* v. *Lane.* (2) In Jarman on Wills, 7th ed., p. 1372, it is stated that the rule applies to personalty. The rule is mentioned also in Roper on Legacies, p. 571. If it applies to a gift of mixed realty and personalty there is no reason why it should not apply to a gift of pure personalty.

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(1) 9 Cl. & F. 583.

J. F. Bowyer for L. K. Baynes.

H. S. G. Buckmaster for a residuary legatee. There is no intention shown in this will of the gift being a vested legacy, subject to being divested in certain events. It is purely a contingent gift. There is no case in which the rule has been applied to a case of pure personalty.

FARWELL J. The first question that is raised on this summons is whether the legacy of 5000*l.* given to the granddaughter, Elizabeth Lorna Heath, is a vested gift liable to be divested in certain events or whether it is a contingent legacy. The question is one of some importance in this case, because if the legacy of 5000*l.* is vested the income derived from it will be applicable for the maintenance of the granddaughter until she attains the age of 21 years. On the other hand, if the legacy is a contingent legacy then the income will not be so applicable. It is therefore of importance for the parties to know which is the true construction of this gift.

Apart altogether from authority I think that anyone looking at the terms of the gift itself would not hesitate long before they said that it was a contingent gift; it looks from the language used as though that was what the testator intended and that it ought to be so construed. It is said however that that is not the true construction, because there is a prima facie rule, which ought to be applied in a case of this kind—namely, that a gift in these terms or in similar terms where there is a gift over to a particular person, is a vested

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(1) (1866) L. R. 2 Eq. 736.

(2) (1870) L. R. 10 Eq. 501.

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and not a contingent gift. The rule is frequently referred to as the rule in *Phipps* v. *Ackers* (1), because it was so decided in that case, which was a decision of the House of Lords. The question in that case concerned a devise of realty. The rule is stated in Mr. Hawkins' book, 3rd ed., p. 280. It is mentioned under the heading of *Edwards* v. *Hammond* (2), which was an earlier case than *Phipps* v. *Ackers* (1), but was one of the cases cited and approved by the House of Lords in *Phipps* v. *Ackers* (1). The rule is stated in this way: "If real estate be devised to A. 'if' or 'when' he shall attain a given age, with a limitation over in the event of his dying under that age, the attainment of the given age is held to be a condition subsequent and not precedent, and A. takes an immediate vested estate subject to be divested upon his death under the specified age. And if the devise be to A. if or when he shall attain a given age, with a limitation over upon his death under that age without issue, A. takes a vested estate, defeasible only in the event of his death without issue under the specified age." The rule is stated in Mr. Jarman's book, 7th ed., p. 1350, in very much the same terms: "The construction also obtains" (that is the construction which the House of Lords put upon the devise in *Phipps* v. *Ackers* (1)) "where the lands are devised to trustees, upon trust to convey to limitations of the nature of those under consideration." Then he cites *Phipps* v. *Ackers* (1) and says: "This decision is generally treated as the leading case on the question; the principle on which it was decided is, that the gift over in the event of the devisee dying under twenty-one shows the meaning of the testator to have been, that the first devisee should take whatever interest the party claiming under the gift over is not entitled to, which gives the first devisee the immediate interest, subject only to the chance of its being divested on a future contingency." Mr. Hawkins, in the first edition of his book, p. 241, stated the principle in this way: "Where the devise is to a party at a given age, and the property is

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(1) 9 Cl. & F. 583.

(2) (1683) 1 B. & P. N. R. 324 *n.*; 3 Lev. 132.

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given over if the devisee dies under that age, . . . the Court has discovered an intention expressed in the will, that the first devisee shall take all that the testator has to give, except what he has given to the devisee over; and in order to give effect to that intention, has held by force of the language of the will, that the first devise was not contingent, but vested, subject to be divested upon the happening of the event upon which the property was given over." This passage appears to be a quotation from the judgment of Wigram V.-C. in *Bull* v. *Pritchard*. (1) If that be the true ratio decidendi of this rule of construction in the case of a devise of real estate it appears to me it must apply notwithstanding that there may be more than one contingency, that is to say, supposing in this case there had been a devise of real estate, this rule would have applied although the gift over was to take effect in either of the two events—i.e., the devisee predeceasing the testator or surviving the testator and not attaining the age of 21 years or marrying under that age. In my judgment, apart from anything else in the will, had this been a case of a devise of real estate the rule to which I have referred as the rule in *Phipps* v. *Ackers* (2) would have applied.

Further, it appears from the cases which have been cited that the rule is applicable in a case where the gift is a gift of both personalty and realty. It was so decided in *Whitter* v. *Bremridge* (3), where reading the headnote there was a "Gift of residuary real and personal estate upon trust to sell and invest, and pay 'the said property and interest arising therefrom to A., on his attaining the age of twenty-four years; but in case of his not attaining that age, or leaving male issue, I give, devise, and bequeath the said properties' to other persons.—*Held*, that A. took an absolute vested interest in the testator's residuary estate liable to be divested in the events mentioned in the will." There Page Wood V.-C., dealing with that case in his judgment, which is extremely short, begins by saying: "The case follows *Phipps* v. *Ackers*." (2) So it is quite plain the learned

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(1) (1847) 5 Hare, 567, 571.

(2) 9 Cl. & F. 583.

(3) L. R. 2 Eq. 736.

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Vice-Chancellor took the view that the rule of construction to be found in the case of *Phipps* v. *Ackers* (1) applied, although the subject-matter of the gift was not confined to realty, that is to say, it was applicable to a case where both real and personal estate were the subject-matter of the gift.

There is another decision to the same effect, *Finch* v. *Lane* (2), where Lord Romilly, dealing with the case of real and personal estate, used the same words: "The case is governed by *Phipps* v. *Ackers*." (1) I think it is reasonably plain that the rule of construction is one which is not confined to a devise of realty, but is applicable where the gift is a mixed gift of realty and personalty. So far as the industry of counsel has been able to discover there is apparently no case in which it has been definitely held that this rule applies in the case of personalty alone, although there is some indication that the rule does so apply to be found in *In re Francis, Francis* v. *Francis*. (3) When one looks at the ratio decidendi of the rule in *Phipps* v. *Ackers* (1), as stated both by Mr. Jarman and by Mr. Hawkins—and the learned text writers in both those cases in my judgment rightly interpreted that decision—when one looks at the ratio decidendi it is difficult to see why it should not apply to a case of personal estate. That view is greatly strengthened when one finds two learned judges having apparently no doubt whatever that the rule is applicable in a case where there is a gift, not only of realty but also of personalty. I confess I am unable to find any logical reason for saying that the rule applies to a gift of realty and to a gift of mixed realty and personalty, but not to a gift of pure personalty. No doubt in some respects different considerations apply to devises of real estate and gifts of pure personalty, but in a case of this kind there does not appear to be the smallest reason for saying that the rule in *Phipps* v. *Ackers* (1) does not equally apply in both cases. In my judgment it is impossible not to come to the conclusion that that rule, applicable as it undoubtedly is to realty, applicable as it undoubtedly is to a mixed gift of realty and personalty,

(1) 9 Cl. & F. 583.

(2) L. R. 10 Eq. 501, 503.

(3) [1905] 2 Ch. 295, 299.

is also applicable to a gift of personal estate. But there is this to be remembered, the rule in *Phipps* v. *Ackers* (1) is a rule of construction only and therefore a rule which, whether the gift be of real estate or of real and personal estate may be excluded if it appears from the will itself that the prima facie rule of construction was not intended to apply. One has therefore to look at the will as a whole in each case to see whether there is anything which excludes what otherwise is the prima facie rule of construction. Looking at the gift in this case it seems to me that the rule in *Phipps* v. *Ackers* (1) does apply and that accordingly this gift is vested and not contingent. In the absence of a gift over this would be a contingent gift, because the whole basis of the decision in *Phipps* v. *Ackers* (1) rests upon the fact that there is a gift over, but there being a gift over in this case, the rule is applicable unless there is anything in the other parts of the will to exclude it.

I have looked carefully at the various provisions in the will to which my attention has been directed and I am unable to satisfy myself that there is anything in those provisions which excludes the application of the prima facie rule in this case. Accordingly, in my judgment, the gift in this case of the 5000*l.* to Elizabeth Lorna Heath is a vested gift, liable to be divested in the events stated in that gift.

Solicitors for all parties: *Biddle, Thorne, Welsford & Gait.*

(1) 9 Cl. & F. 583.

P. J. B.

FARWELL
J.

1935

Oct. 29.

In re CHANCE.

[1935. C. 1413.]

Creditor and debtor—Judgment—Writ of Elegit registered in Land Registry as a charge—Application by creditor for Order to sell debtor's interest in certain freehold property within one year of judgment—Application granted—Judgments Act, 1864 (27 *&* 28 *Vict. c.* 112), *s.* 4—*Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 195, *sub-ss.* 1, 2, 3 (*i.*) (*ii.*), 5.

Sect. 4 of the Judgments Act, 1864, provides: "Every creditor to whom any land of his debtor shall have been actually delivered in execution by virtue of any . . . . judgment . . . . and whose writ or other process of execution shall be duly registered, shall be entitled forthwith, or at any time afterwards while the registry of such writ or process shall continue in force, to obtain from the Court of Chancery . . . . an order for the sale of his debtor's interest in such land. . . . ."

Sect. 195, sub-s. 2, of the Law of Property Act, 1925, provides: "Every judgment creditor shall have the same remedies against the estate or interest in the land so charged or any part thereof as he would have been entitled to if the judgment debtor had power to charge the same, and had by writing, under his hand, agreed to charge the same, with the amount of the judgment debt and interest thereon." Sub-s. 3: "Provided that—(ii.) No judgment creditor shall be entitled to take proceedings to obtain the benefit of his charge until after the expiration of one year from the time of entering up the judgment."

A judgment creditor obtained a judgment for payment of 1250*l.* A writ of elegit was issued and the sheriff took possession of certain freehold land of the debtor. The writ was registered in the Land Registry as a charge.

The judgment creditor made an application for an order for the sale of the debtor's interest in the land within one year after the date of the judgment:—

Held, that s. 4 of the Judgments Act, 1864, was not impliedly repealed by the Law of Property Act, 1925, and that a writ of elegit having been issued and registered in the Land Registry, the judgment creditor was entitled to the order he asked for.

ADJOURNED SUMMONS.

On October 30, 1934, the appellant, the judgment creditor, obtained a judgment for the recovery of 1250*l.* against the respondent, the judgment debtor. By an order, dated November 14, 1934, a receiver was appointed to receive the rents, profits and moneys receivable in respect of the respondent's interest in certain freehold property in the county of London. On November 30 a writ of elegit was issued, and on December 6 the sheriff went into possession of the land in question. On December 6 the writ was registered in the Land Registry as a charge.

By this summons the applicant applied for an order that the interest of the respondent in the premises might be sold, and that the money arising from such sale might be applied in payment of the 1250*l.* due to the applicant under the judgment of October 30, 1934.

A. de W. Mulligan for applicant. The Judgments Act, 1838 (1 & 2 Vict. c. 110), dealt with judgments, not with writs of execution. A judgment is not a charge until a writ of elegit is registered, when it becomes an immediate charge. When a writ of elegit has been registered, a creditor is the virtual owner of the land, subject to the right of redemption by the debtor. Sect. 4 of the Judgments Act, 1864, was not repealed by the Law of Property Act, 1925. The provisos in sub-s. 3 of s. 195 of that Act have to be read separately.

F. G. Underhay for respondent. Sect. 13 of the Judgments Act, 1838, was repealed by the Law of Property Act, 1925, and re-enacted by s. 195, sub-ss. 1, 3, of that Act. The provisions of s. 195, sub-s. 3 (ii.), of the Law of Property Act, 1925, are wholly inconsistent with the provisions of s. 4 of the Judgments Act, 1864, and the Court will hold that s. 4 is therefore repealed by implication. The applicant is not entitled to the order he asks for until one year from the date of the judgment.

[He referred to *In re Bailey's Trusts.* (1)]

Farwell J. In this case the applicant is asking for an order that certain property may be sold and the money applied in payment of a judgment debt of 1250*l.* The judgment was obtained on October 30, 1934, for the sum of 1250*l.* On November 30 a writ of elegit was issued, and on December 6 the sheriff went into the land in question. On December 10

(1) (1869) 38 L. J. (Ch.) 237.

the writ was registered in the Land Registry as a charge. On that the applicant applies for an order for sale, but it is said on behalf of the respondent that the applicant is not entitled to an order for sale, or any other relief, until the expiration of one year from the time of entering up the judgment.

Whether that contention be right or wrong depends on the true construction of s. 195 of the Law of Property Act, 1925. It is not disputed that before that Act came into force the applicant would have been entitled to the relief which he now seeks; nor is it disputed that s. 4 of the Judgments Act of 1864, under which the applicant would be entitled to the relief which he seeks, has not been in terms repealed.

There are in the Schedule to the Act of 1925, and to the Amending Act, various statutes and sections of statutes which are in terms repealed; but s. 4, the material section here, is not included among the repealed Acts or sections, and therefore prima facie it is not repealed; but it may be that the terms of s. 195 are so inconsistent with the provisions of the earlier Act that the effect of it is that impliedly s. 4, or some portion of that section, must be treated as having been repealed, although not expressly so stated. But I think it is right to say this, that where a later Act does in terms repeal various earlier statutes, or sections of statutes, and does not include in those repealed sections and statutes the particular section or statute in question, the Court ought to be slow to read a section of the later Act as impliedly repealing the earlier enactment. If the Court is forced to the conclusion that such enactment must be treated as repealed then it must do so, but I think that it should not do so unless it is impossible to put any reasonable meaning on the later section without implying the repeal of the earlier Act.

The section in question is s. 195 of the Law of Property Act, 1925, and sub-s. 1 provides: "Subject as hereinafter mentioned a judgment entered up in the Supreme Court (whether before or after the commencement of this Act) against any person (in this section called a 'judgment debtor') shall operate as an equitable charge upon every estate or interest (whether legal or equitable) in all land to or over which the judgment debtor at the date of entry or at any time thereafter is or becomes—(*a*) beneficially entitled; or (*b*) entitled to exercise a power of disposition for his own benefit without the assent of any other person; and the judgment shall bind —(i.) the judgment debtor; and (ii.) all persons deriving title under him subsequently to the entry of the judgment; and (iii.) all persons capable of being bound by a disposition by the judgment debtor made after the entry of the judgment, including the issue of his body and all other persons, if any, whom he might, without the assent of another person, have barred from any remainder, reversion or other interest, in the land." Then sub-s. 2 provides: [His Lordship read sub-s. 2, and continued:] The judgment creditor in sub-s. 2 must, I think, mean a person who has got a simple judgment against another—against the person who is called in this Act the judgment debtor. A person who has got a simple judgment against the judgment debtor is entitled to a charge similar to the one that he would have had if the judgment debtor had executed a document giving him a charge on the land in question.

It is to be remembered that by s. 195, sub-s. 5, it is provided that in that section "judgment" includes any decree, order, or rule having the effect of a judgment. So that there is nothing that I can see in those sub-sections which can affect the right of a person in the position of the applicant here. But there are certain provisos set out in sub-s. 3 of s. 195 to which I must now refer. The first is this: "(i.) A judgment, whether obtained (on behalf of the Crown or otherwise) before or after the commencement of this Act, shall not operate as a charge on any interest in land or on the unpaid purchase money for any land unless or until a writ or order, for the purpose of enforcing it, is registered in the register of writs and orders at the Land Registry." It is not disputed here by the applicant that that proviso applies to a case such as this; that is to say, he admits that before he could have made this application he was bound to get his writ registered at the Land Registry, and that he has done. If that be the true construction of the proviso there would seem to be nothing which would prevent him now coming to the Court for the order which he seeks; but it is said that that proviso does not so operate because by the second proviso it is provided that: [His Lordship read sub-s. 3 (ii.) and continued:] If that proviso applies to a case of this kind, to that extent at any rate it must operate to repeal s. 4 of the Judgments Act, because by virtue of that Act the applicant would be entitled now to the order which he seeks; and this proviso, if it applies in this case, prevents him getting for a period that to which he would have been presently entitled. The question is: Am I to read the second proviso in sub-s. 3 as applicable to a case such as the present? When one turns back to see what a judgment debtor is—what the term means according to s. 195, sub-s. 1—and one looks at the meaning of the words "judgment creditor" in sub-s. 2, I think it is reasonably plain that both those expressions are referring to a person who has got a simple judgment, and do not, and are not intended to, extend to a person who has taken the further step which this applicant has taken of issuing a writ and getting it extended to the land in question.

If that be the true reading of this Act, then the first proviso does apply in a case of this kind, and registration is necessary; but the second proviso does not operate to prevent a person who has got that form of relief from obtaining an order for an immediate sale, notwithstanding that a year has not expired since the time of entering the judgment.

Reading sub-s. 3 in that way it is not necessary to come to the conclusion that the relevant section of the earlier Act has been repealed. As I have already said, I think that if it is possible it is my duty so to read the section; that is to say, so to read it as not to effect an implied repeal of the earlier Act. Reading the section in this way makes the form of it somewhat inconvenient, but I do not think that is sufficient to justify me in saying that the effect of the second proviso is a partial repeal of the earlier Act. As I think that it is possible to read this section in such a way as to make it consistent with the law as it was before this Act came into operation, that is the way I ought to read it, and, accordingly, I have come to the conclusion that the second proviso of sub-s. 3 as to the postponement of the benefit of the charge does not apply to a case such as this where the judgment creditor has been let into possession of the property under a writ of elegit, and apart from some possible right of redemption in the judgment debtor is in the position of the owner of the property.

In those circumstances the applicant is entitled to the order which he seeks.

Solicitors for the applicant: *Edmond O'Connor & Co.*
Solicitor for the respondent: *R. J. Preston.*

P. J. B.

In re NATIONAL FLYING SERVICES, LIMITED.

COUSINS *v.* THE COMPANY.

[1933. N. 1199.]

FARWELL J.
1935
Oct. 31.

Company—Debentures—Appointment of Receiver—Employment of agent by Receiver to find purchaser of Company's assets—No application by Receiver to Court for leave to employ agent—Sale by tender—Claim by agent for commission—Discretion of Court.

A receiver appointed by the Court in a debenture-holders' action employed an agent for the purpose of introducing a purchaser of certain property belonging to the company. The receiver did not apply to the Court for leave to employ the agent. The agent was successful in finding a purchaser for the property. On an application by the agent for an order directing the receiver to pay him commission:—

Held, that where a receiver has not applied to the Court for leave to employ an agent, the agent is not entitled to any commission; but the Court has a discretion to award him such compensation for his efforts as the Court considers just in the circumstances of the particular case.

ADJOURNED SUMMONS.

This was an application in a debenture-holders' action taken out by M. L. Bramson, and it asked for an order that the receiver, appointed in June, 1933, should be directed to pay to the applicant 1557*l.* 10*s.* for commission as remuneration in respect of the services rendered by the applicant in negotiating for and procuring a purchaser of the Hanworth Aerodrome with effects (part of the assets of the company) at the price of 100,000*l.*

In May, 1934, the applicant approached the receiver with regard to the sale of the Hanworth Aerodrome to the Middlesex County Council, and the receiver agreed that, in the event of the purchase being completed, he would apply to the Court for sanction to pay the applicant commission. A draft contract for sale at the price of 93,000*l.* was submitted to the Clerk of the Council and was discussed by the Council on July 2, 1934, but the matter proceeded no further. On June 4 the applicant introduced to the receiver as purchasers of the property the British Pacific Trust, Ld., at a price of 96,000*l.* and he sent to the receiver their formal offer. The applicant claimed that this was done on the same footing as to commission as on the occasion of the introduction of the Middlesex County Council. About the same time another offer to purchase at 90,000*l.* was received. In both these cases contracts were signed by the receiver as conditional contracts. On July 2 they came before Clauson J. to obtain the sanction of the Court, but he refused to sanction either contract and directed that tenders should be invited for the property. On August 3, 1934, a tender at 100,000*l.* by the British Pacific Trust, Ld., was accepted, and in due course the purchase money was paid into Court and the purchase was completed. No application was made to the Court by the receiver for leave to employ the applicant.

G. R. Upjohn for applicant. Although an irregularity was committed by the receiver in not applying to the Court for leave to employ the applicant, yet the Court will allow him something for his trouble and expense. The case comes within *Harris* v. *Sleep*. (1)

J. A. Reid for the debenture-holders' trustees. Where agents

(1) [1897] 2 Ch. 80, 84.

introduce a possible purchaser for a certain property, but nothing comes of the negotiations, and later the property is put up for sale by public auction and is purchased by the person originally introduced by the agents, the agents are not entitled to commission: *Taplin* v. *Barrett.* (1) That case applies here.

The receiver by not applying at the proper time for leave to employ the applicant has embarrassed the Court, and the Court will not grant the present application.

FARWELL J. The Hanworth Aerodrome formed part of the property secured by the trust deed and the receiver was concerned to find a purchaser for it. Mr. Bramson was a man of considerable experience both in actual flying and in dealing with aerodromes. He approached the receiver and suggested that he might be able to find a purchaser, and the receiver told him that if he found a purchaser he would apply to the Court for leave to pay him a commission. The receiver did not enter into any binding contract to pay commission, but if he intended Mr. Bramson to exert himself in finding a purchaser it was clearly his duty to apply to the Court for leave so to employ him. Unfortunately he did not do so, with the result that the Court is now perfectly free to refuse the payment of any commission at all.

It must be clearly borne in mind that any such arrangement as that made in this case does not entitle the agent to any commission. The parties are entirely at the mercy of the Court. As there appears to be a growing tendency for agents to employ themselves in cases of this kind with the idea that if they find a purchaser they will receive commission, it is necessary to say that in such a case the Court is in no way bound to order payment of any commission. The Court will consider each case on its merits. In a proper case it is open to the Court to say that it is not equitable to allow advantage to be taken of the agent's efforts without some compensation to him, although prima facie he is entitled to nothing. In any event there can be no question of a scale

(1) (1889) 6 Times L. R. 30.

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fee. In the present case the evidence shows clearly that the property was not one which could be easily disposed of, and that Mr. Bramson by his knowledge and experience was in a good position to find a purchaser and that he expended considerable time and money to that end. Under those circumstances it would not be equitable to allow the debenture-holders to take advantage of his efforts without any compensation. The sum which in the special circumstances should be allowed is 1000*l.*

Solicitors: *Norman Hart & Mitchell; Last, Riches & Fitton.*

P. J. B.

FARWELL J.

1935

Oct. 31.

In re BERREY.

LEWIS *v.* BERREY.

[1934. B. 4087.]

Descent—Intestacy—Person of unsound mind—Real estate—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *s.* 45, *sub-s.* 1; *s.* 51, *sub-s.* 2*—Legitimacy Act,* 1926 (16 & 17 *Geo.* 5, *c.* 60), *s.* 3, *sub-s.* 1.

E. M. B., who had for many years been a person of unsound mind, died on February 22, 1933, intestate and a spinster, without parents or brother or sister of the whole blood. Her estate consisted of real and personal property. There were two claimants to her real estate, the first defendant, who would be entitled apart from and before the coming into force of the Legitimacy Act, 1926, and the second defendant, who was not legitimate at the time of her birth, but by reason of the subsequent marriage of her parents was legitimated by virtue of the Legitimacy Act, 1926, and who would have been entitled if legitimate. The Administration of Estates Act, 1925, s. 45, sub-s. 1, provides: " With regard to the real estate and personal inheritance of every person dying after the commencement of this Act, there shall be abolished—(*a*) All existing modes rules and canons of descent, and of devolution by special occupancy or otherwise, of real estate. . . . ." Sect. 51, sub-s. 2, provides: " The foregoing provisions of this Part of this Act do not apply to any beneficial interest in real estate (not including chattels real) to which a lunatic or defective living and of full age at the commencement of this Act, and unable, by reason of his incapacity, to make a will, who thereafter dies intestate in respect of such interest without having recovered his testamentary capacity, was entitled at his death, and any such beneficial interest (not being an interest ceasing on his death) shall, without prejudice to any will of the deceased, devolve in accordance with the general law in force before the commencement of this Act applicable to freehold land, and that law shall, notwithstanding any repeal, apply to the case" :—

Held, that on the true construction of s. 45, sub-s. 1, and s. 51, sub-s. 2, the descent of the real estate of a person who was of unsound mind before the commencement of the Act and who died intestate while still of unsound mind remained unaltered and that the real estate passed to the persons who would have taken it before the commencement of the Act, and accordingly, the first defendant was the person entitled to the real estate of the intestate.

ADJOURNED SUMMONS.

E. M. Berrey died on February 22, 1933, intestate and a spinster, without parents or brother or sister of the whole blood. She had been for many years before the commencement of the Administration of Estates Act, a person of unsound mind. Owing to her half-brother, the first defendant, being a person under disability, letters of administration to her estate were granted to the plaintiff as the person authorized under an order made under the Lunacy Act, 1890 (53 Vict. c. 5), and Amending Acts. The intestate's estate consisted of real and personal property. The question that arose on this summons was in respect of the realty. The first defendant claimed that he was entitled, apart from and before the coming into force of the Legitimacy Act, 1926. The second defendant was not legitimate at the time of her birth, but by reason of the subsequent marriage of her parents, she claimed that by virtue of the Legitimacy Act she was entitled to the realty.

The summons asked that it might be determined whether the second defendant, a legitimated person by virtue of the Legitimacy Act, 1926, was capable, having regard to s. 51, sub-s. 2, of the Administration of Estates Act, 1925, of inheriting the real estate of the intestate.

H. F. F. Greenland for plaintiff.

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D. Ll. Jenkins for first defendant. Sect. 51, sub-s. 2, of the Administration of Estates Act, 1925, has fixed once and for all the descent of real estate of a person of unsound mind living at the commencement of the Act and dying intestate. It passes to the persons who would have taken before the commencement of the Act. That sub-section is only repealed by implication by s. 3, sub-s. 1, of the Legitimacy Act, 1926. (1) Implication of repeal by a later Act or section of a later Act of an earlier Act or section of an earlier Act will not be accepted by the Court, unless, for some special reason, it is compelled to do so. There is no special reason why the Court should hold that s. 51, sub-s. 2, of the Administration of Estates Act has been repealed by s. 3, sub-s. 1, of the Legitimacy Act. The first defendant is, therefore, entitled to the real estate of the intestate.

Roger Turnbull for second defendant. The second defendant is entitled to the real estate, owing to her having been legitimated by the Legitimacy Act, 1926. By virtue of s. 45, sub-s. 1, of the Administration of Estates Act, all the old canons of descent disappeared, but they were restored by s. 51, sub-s. 2, in the case of a person of unsound mind dying intestate. The provisions of that section are wholly inconsistent with the provisions of the Legitimacy Act. Where the provisions of two Acts are wholly inconsistent, the later Act prevails. By s. 2 of the Deceased Wife's Sister's Marriage Act, 1907 (7 Edw. 7, c. 47), an exception was made to the general provisions of that Act. There is no such exception in the Legitimacy Act, 1926. The second defendant takes the real estate of the intestate by virtue of s. 3, sub-s. 1, of that Act.

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(1) Legitimacy Act, 1926, s. 3, sub-s. 1: "Subject to the provisions of this Act, a legitimated person and his spouse, children or more remote issue shall be entitled to take any interest—

(*a*) in the estate of an intestate dying after the date of legitimation;

(*b*) under any disposition coming into operation after the date of legitimation;

(*c*) by descent under an entailed interest created after the date of legitimation;

in like manner as if the legitimated person had been born legitimate."

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FARWELL J. One Elizabeth Berrey died a spinster on February 22, 1933, intestate. She was at the date of her death and she had been for many years before of unsound mind. The question has arisen in the administration of her estate, as to the persons entitled to the freehold property which belonged to her.

There are two claimants before me; the first defendant, who would have been the person entitled to the property apart from and before the coming into force of the Legitimacy Act of 1926, and the second defendant, who claims that by virtue of the Legitimacy Act she is entitled to the property. The question depends entirely upon the construction of two or three sections of that Act and the Administration of Estates Act, 1925. The second defendant was not legitimate at the time of her birth but by reason of the subsequent marriage of her parents became, on the passing of the Legitimacy Act, which came into operation on January 1, 1927, as from that date, legitimated and having the rights of a legitimate person save and so far as those rights are curtailed by the provisions of the Act. The Legitimacy Act, 1926, provides in s. 1, sub-s. 1: "Subject to the provisions of this section, where the parents of an illegitimate person marry or have married one another, whether before or after the commencement of this Act, the marriage shall, if the father of the illegitimate person was or is at the date of the marriage domiciled in England or Wales, render that person, if living, legitimate from the commencement of this Act, or from the date of the marriage, whichever last happens." Then sub-s. 3 recites: "The legitimation of a person under this Act does not enable him or his spouse, children or remoter issue to take any interest in real or personal property save as is hereinafter in this Act expressly provided." Sect. 3 provides for the interests which such a person may take and sub-s. 1 says that: [His Lordship read s. 3, sub-s. 1, and continued:] It is said on behalf of the second defendant that she is a person who is entitled under that section to take an interest in the estate of the intestate, because the intestate died after the date of her legitimation and that that being so she is the person who is now entitled to the real estate. On the other hand, the first defendant relies upon s. 51 of the Administration of Estates Act, 1925. That Act came into operation on January 1, 1926. Sect. 51, sub-s. 2, provides: [His Lordship read s. 51, sub-s. 2, and continued:] It is said on behalf of the first defendant that under the law as it was before the passing of the Act of 1925 a person in the position of the second defendant could not have taken any interest in the property and that the provision that the property shall "devolve in accordance with the general law in force before the commencement of this Act" can only mean that the first defendant, who was the person who by the law in force before the coming into operation of the Administration of Estates Act, was entitled to the real estate, is the person now entitled. It is necessary to look back and see what it is that the Administration of Estates Act is dealing with in sub-s. 2 of s. 51. Looking at s. 45, sub-s. 1, it appears: "With regard to the real estate and personal inheritance of every person dying after the commencement of this Act, there shall be abolished—(*a*) All existing modes rules and canons of descent, and of devolution by special occupancy or otherwise, of real estate." The effect of this provision of the Administration of Estates Act, 1925, is to put an end to the descent of real estate as it was before the coming into operation of that Act. It is said that the words "modes rules and canons of descent" only mean that the way in which real estate descended was put an end to and no more than that, and that read in that way s. 51, sub-s. 2, does not operate in such a way as to be inconsistent with s. 3 of the Legitimacy Act, 1926. If I gave effect to that argument I should in truth be disregarding altogether the last words of sub-s. 2, that is the words "any such beneficial interest . . . . shall . . . . devolve in accordance with the general law in force before the commencement of this Act applicable to freehold land, and that law shall, notwithstanding any repeal, apply to the case." In my judgment, on the true construction of these sections of the Administration of Estates Act, 1925, the result is to leave unaltered the descent of real estate of a person who dies intestate and of unsound mind; that is to say, in the case of an intestate who dies of unsound mind the real estate of that intestate is to pass to the persons who would have taken it under the law as it was before the commencement of that Act and notwithstanding the alterations made by the Act.

If that be the true view, apart from the Legitimacy Act, it is quite plain that the second defendant would have no right at all. The old law did not recognise persons born out of wedlock as capable of inheriting and the property would have devolved and must have devolved upon the footing that the person who was not legitimate was not entitled to come in and claim at all.

Then one comes to the Legitimacy Act of 1926, and it is quite true that s. 3, sub-s. 1, of that Act provides: "Subject to the provisions of this Act, a legitimated person . . . . shall be entitled to take any interest (*a*) in the estate of an intestate dying after the date of legitimation." This section would seem at first sight not to be consistent with s. 57, sub-s. 2, of the Administration of Estates Act, 1925, but there is no such inconsistency as compels me to hold that the Legitimacy Act of 1926, impliedly repeals the provisions of the earlier Act. It is well settled that the Court does not construe a later Act as repealing an earlier Act unless it is impossible to make the two Acts or the two sections of the Act stand together, i.e., if the section of the later Act can only be given a sensible meaning if it is treated as impliedly repealing the section of the earlier Act. In my judgment there is no such impossibility in this case. Sect. 51 leaves the persons interested in the estate of an intestate who was of unsound mind before and at the time of her death in exactly the same position as they would have been if the Administration of Estates Act had not been passed. In my judgment the subsequent Act does not have the effect of bringing in and adding to the persons who under the old law would be entitled to take a person who by the old law was not entitled to take and can only claim to be entitled by virtue of the Legitimacy Act, 1926. I come to the conclusion, although

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the matter is not free from doubt, that the second defendant in this case is not entitled to the real estate, and, accordingly, the first defendant is the person so entitled.

Solicitors: *Field, Roscoe & Co., for Perry, Parr & Ford, Nottingham; The Official Solicitor; Smith & Hudson, for Eking, Manning, Morris & Foster, Nottingham.*

P. J. B.

FARWELL J.
1935
Nov. 7.

In re WALKER'S SETTLEMENT TRUSTS.

WATSON *v.* WALKER.

[1935. W. 1986.]

Debenture Stock—Light Railway Company—Settlement—Issue by Company of Debenture Stock—Debenture Stock registered in names of Trustees of Settlement—Company wound up—Assets not sufficient to repay Debenture Stock and arrears of interest thereon—Apportionment of assets between Capital and Income.

A light railway company was promoted to serve the interests of an estate that formed part of a settled estate. It was incorporated under an order made by the Light Railway Commissioners and confirmed by the Minister of Transport. Clause 50 of the order provided: " The company may create and issue debenture stock . . . . The interest of all debenture stock and of all mortgages at any time created and issued or granted by the company under this Order or any subsequent Order or Act of Parliament shall, subject to the provisions of any subsequent Order or Act, rank pari passu . . . . and shall have priority over all principal moneys secured by such mortgages." Debenture stock to the amount of 8000*l.* was issued by the company and was registered in the names of the trustees of the settlement. On the winding up of the company, the assets that came into the hands of the trustees were not sufficient to pay off the debenture stock and the arrears of interest thereon:—

Held, that the assets should be apportioned between capital and income in accordance with the principle laid down in *In re Atkinson, Barbers' Co.* v. *Grose-Smith* [1904] 2 Ch. 160.

ADJOURNED SUMMONS.

Under the provisions of a settlement, dated July 2, 1912, the Sand Hutton Estate in Yorkshire and certain other lands and capital moneys were settled on limitations and trusts (subject to certain prior interests which have now all ceased) for the benefit of the late Sir Robert James Milo Walker for his life with remainder (subject to certain jointure rent charges and to a charge for portions of his younger children) to his eldest son for an estate in tail male.

In the events which happened Sir Robert's eldest son was the defendant, Sir James Heron Walker, who attained twenty-one on April 6, 1935, and by deed dated April 9, 1935, disentailed the estate and capital moneys and limited them to himself absolutely, subject to the jointure rent charges and portions. Sir Robert's only other child was the defendant, Peter Arthur Walker, who was born on October 7, 1918, and will, on his attaining the age of twenty-one, be the only person entitled to the portions and mesne interest thereon.

The plaintiffs were appointed on July 28, 1924, to be the trustees of the settlement for the purposes of the Settled Land Acts for the time being in force.

The Sand Hutton Light Railway Company was promoted by Sir Robert in the interests of the Sand Hutton Estate. It was incorporated under and by virtue of the Sand Hutton Light Railway Order, 1920, made by the Light Railway Commissioners in pursuance of the powers given to them by the Light Railways Acts, 1896 and 1912. The order was confirmed by the Minister of Transport and came into force on May 1, 1920. Clause 11 authorized the construction of certain railways therein mentioned, all at or near Sand Hutton. Clause 44 provided that the capital of the company should be 25,000*l.* in 2500 shares of 10*l.* each. Clause 50 was in the following terms: "The company may create and issue debenture stock subject to the provisions of Part III. of the Companies Clauses Act, 1863, as amended by subsequent Acts, but notwithstanding anything therein contained, the interest of all debenture stock and of all mortgages at any time created and issued or granted by the company under this Order or any subsequent Order or Act of Parliament shall, subject to the provisions of any subsequent Order or Act, rank pari passu (without respect to the dates of the securities or of the Orders or Acts of Parliament or resolutions by which the stock and mortgages were authorised) and shall have priority over all principal moneys secured by such mortgages. Notice of the effect of this provision shall be endorsed on all such mortgages and certificates of such debenture stock."

The capital of the company was fully issued and paid up and the company also issued debenture stock to the nominal value of 8000*l.*, all of which was issued and paid up in full. On November 28, 1922, an order of the Court was made sanctioning an agreement dated July 4, 1922, under which the trustees of the settlement were authorized to acquire (and they did in fact acquire) the shares of the company out of capital moneys arising under the settlement and to raise out of capital moneys under the settlement and pay to the company upon the best security therefor which the company could give any sum or sums not exceeding in the whole 8000*l.* for the purpose of completing the railway. Under this authority the trustees took and paid for all the debenture stock, which at all material times was registered in the names of the trustees for the time being of the settlement, and for some years until the final dissolution of the company was registered in the names of the plaintiffs.

Sir Robert died on February 11, 1930. The defendants, Dame Esme Ethel Alice Walker and Percy Marlborough Stewart, together with the plaintiffs, were his legal personal representatives.

On March 22, 1932, the company in general meeting resolved that it was desirable that the company should be wound up and that an application should be made to the Minister of Transport for an order declaring that the company should be wound up, and such order was made by the Minister of Transport on April 22, 1932. By an order of the Court, dated October 24, 1932, and made on a petition dated July 19, 1932, it was ordered that the company be wound up compulsorily. The plaintiffs received from the receiver and liquidator of the company the sum of 2291*l.* as the amount of the assets available in his hands for the purpose of satisfying

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the debenture stock and the interest thereon. The arrears of interest apportioned down to February 11, 1930, the date of the death of Sir Robert, amounted to 1733*l.* 15*s.* 6*d.*, and the arrears from that date down to July 19, 1932, the date of the petition, amounted to 875*l.* 16*s.* 8*d.*

The plaintiffs took out this summons asking to have it determined whether the sum of 2291*l.* and any interest accrued thereon since it was received by the plaintiffs ought to be apportioned as between (*a*) capital and (*b*) arrears of interest accrued in the lifetime of Sir Robert, and (*c*) subsequent arrears of interest in the proportion of (*a*) 8000*l.*, (*b*) 1733*l.* 15*s.* 6*d.*, and (*c*) 875*l.* 16*s.* 8*d.*, or whether the whole of the arrears of interest, amounting to 1733*l.* 15*s.* 6*d.* and 875*l.* 16*s.* 8*d.* respectively, should be repaid in priority to any capital repayments, and in the latter case whether such last two repayments ranked pari passu, and in either alternative whether the figure of 875*l.* 16*s.* 8*d.* ought to be reduced to 789*l.* 5*s.* 7*d.*, being the interest calculated down to April 22, 1932, the date of the order made by the Minister of Transport.

His Lordship held that the amount of interest accrued due subsequent to the death of Sir Robert Walker ought to be calculated down to April 22, 1932.

G. D. Johnston for plaintiffs.

C. A. J. Bonner for Sir James Walker. The sum received by the trustees should be apportioned ratably between the amount due as interest and the 8000*l.* The principle as to ratability laid down in *In re Atkinson* (1) applies.

[He also cited *Attree* v. *Hawe.* (2)]

Humphrey H. King for Peter Walker. There is nothing in clause 50 of the order of 1920 to interfere with the ordinary rule of apportionment between capital and income. Precisely the same clause was dealt with in *Harrison* v. *Cornwall Minerals Ry. Co.* (3)

[He also cited *In re Mersey Ry. Co.* (4)]

G. P. Slade for the personal representatives of Sir Robert

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(1) [1904] 2 Ch. 160.

(2) (1878) 9 Ch. D. 337.

(3) (1881) 18 Ch. D. 334.

(4) [1895] 2 Ch. 287.

Walker. The sum received by the trustees ought to be applied in the first place in payment of the arrears of interest. This was not the kind of security that was in the mind of the Court when it laid down the rule in *In re Atkinson.* (1) We are here dealing with a statutory security, and there is no remedy for the recovery of capital; only for the recovery of interest. Sect. 23 of the Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), makes debenture stock, with the interest thereon, a charge on the undertaking of the company, but no remedy is provided for the recovery of capital. Here there has been a winding up, not a realization of the security. The capital is entitled to nothing until the amount of interest due has been paid.

FARWELL J. The question that I have to determine is how the money that has been received by the trustees of the settlement as holders of 8000*l.* debenture stock in the company ought to be apportioned between capital and income. On the one hand it is said that the principle of *In re Atkinson* (1) applies, and that it ought to be apportioned in the proportion which the amount due for arrears of interest bears to the amount due in respect of the capital sum. On the other hand it is argued that that case has no application here: that this is a security for interest only and that the money received should first be applied in payment of the arrears of interest due. Clause 50 of the Sand Hutton Light Railway Order, 1920, provides:

[His Lordship read clause 50, and continued:]

In this case there is no mortgage, merely the issue of debenture stock, and it is said that the effect of that clause is to give a preference to interest over capital. In my judgment that clause does not operate so as to take the case out of the principle of *In re Atkinson.* (1)

It has also been contended that the remedies of holders of railway debentures and debenture stocks for the recovery of capital are very limited, and that, therefore, debentures

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(1) [1904] 2 Ch. 160.

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and debenture stocks are securities rather for interest than for capital. I cannot accede to that contention.

The money available in this case must be apportioned according to the principle of the case hereinbefore cited.

Solicitors: *Long & Gardiner, for Crust, Todd, Mills & Co., Beverley; Kendall, Price & Francis; Hancock & Willis.*

P. J. B.

FARWELL J.

1935

Nov. 12.

In re HARWOOD.

COLEMAN *v.* INNES.

[1935. H. 1623.]

Charity—Cy-prés Doctrine—Lapse—Gift to named Charitable Institution which had ceased to exist before the death of the testator—Gift to Charitable Institution inaccurately described which had ceased to exist.

Where a testator selects a particular charity and takes some care to identify it, it is very difficult for the Court to find a general charitable intent, if the named society ceases to exist before the testator's death; but a general charitable intent may be inferred where no charitable institution as described in the will has ever existed.

ADJOURNED SUMMONS.

By her will, dated January 22, 1925, the testatrix appointed the plaintiffs to be her executors and trustees, and among other legacies she gave, free of all duty, 200*l.* to the Wisbech Peace Society, Cambridge, 300*l.* to the Peace Society of Belfast, and 300*l.* to the Peace Society of Dublin, and she gave the residue of her estate to her nephew, the defendant E. M. Reid. The testatrix died on July 29, 1934.

The evidence showed that there had been a society called the Wisbech Peace Society, Cambridge, but that it had ceased to exist before the death of the testatrix. The legacy was claimed by the defendant K. E. Innes on behalf of the Peace Committee of the Society of Friends on the ground that that society now carried on the work formerly carried on by the

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Wisbech Peace Society. There was no evidence to show that there ever had been a Peace Society of Belfast. The legacy was claimed by the defendant M. F. Greeves on behalf of the Belfast Branch of the League of Nations Union. With regard to the Peace Society of Dublin, it was said that there had been a Dublin Peace Society, the name of which had been changed to the Irish Peace Society, but that it had ceased to exist many years ago and what was left of its funds had been handed over to the League of Nations Society of Ireland, on whose behalf the legacy was claimed by the defendant W. O'C. Brady. This summons asked for the determination of the questions how each of the three above mentioned legacies should be dealt with; whether they should be paid to the various defendants or whether they ought to be applied cy-près, or whether they failed and fell into the residuary estate.

J. V. Nesbitt for the plaintiffs.

Winterbotham for K. E. Innes.

Andrew Clark for M. F. Greeves.

G. W. Knowles (*G. E. Timins* with him) for W. O'C. Brady.

Wilfrid Hunt for the residuary legatee. Where there is a gift to a charity that has once existed, but has ceased to exist before the death of the testator, the gift lapses and falls into residue: *Fisk* v. *Attorney-General.* (1)

Andrewes-Uthwatt for the Attorney-General. Where the testator has shown a general charitable intention the cy-près doctrine applies: *In re Davis, Hannen* v. *Hillyer.* (2) In this case the testatrix has shown by her bequests a general charitable intent to benefit societies that have for their object the preservation of peace.

FARWELL J. The first question that I have to determine is whether a gift of 200*l.* "to the Wisbech Peace Society, Cambridge" fails. The evidence is that this particular society ceased to exist in the testatrix's lifetime. It is said that it is being still carried on as part of the work of the Peace Committee of the Society of Friends. The onus is upon them to show that they are the persons entitled to take. The evidence in this case is so unsatisfactory that I cannot say that that onus has been discharged.

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(1) (1867) L. R. 4 Eq. 521.

(2) [1902] 1 Ch. 876.

That leaves the question whether there is any general charitable intent, so as to admit of the application of the cy-près doctrine. In the will there is a long list of various charitable societies including charities whose work is devoted to peace. It is said that as this is one of a long list of charitable legacies there is a general charitable intent. On the other hand, it is said that where there is a gift to a particular society, which once existed but ceased to exist before the death of the testator or testatrix, the gift lapses and there is no room for the cy-près doctrine. I have been referred to *In re Davis.* (1) In that case the learned judge was able to come to the conclusion that as to one particular gift there was a general charitable intent; but in that case no such society as that named in the will had ever existed. It was not a case of a society which had been in existence and had ceased to exist. I do not propose to decide that it can never be possible for the Court to hold that there is a general charitable intent in a case where the charity named in the will once existed but ceased to exist before the death. Without deciding that, it is enough for me to say that, where the testator selects as the object of his bounty a particular charity and shows in the will itself some care to identify the particular society which he desires to benefit, the difficulty of finding any general charitable intent in such case if the named society once existed, but ceased to exist before the death of the testator, is very great. Here the testatrix has gone out of her way to identify the object of her bounty. In this particular case she has identified it as being " the Wisbech Peace Society Cambridge (which is a branch of the London Peace Society)." Under those circumstances, I do not think it is open to me to hold that there is in this case any such general charitable intent as to allow the application of the cy-près doctrine.

Accordingly, in my judgment, the legacy of 200*l.* fails and is undisposed of.

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(1) [1902] 1 Ch. 876.

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Then there is the gift to the "Peace Society of Belfast." The claimant for this legacy is the Belfast Branch of the League of Nations Union. I am quite unable on the evidence to say that that was the society which this lady intended to benefit, and I doubt whether the lady herself knew exactly what society she did mean to benefit. I think she had a desire to benefit any society which was formed for the purpose of promoting peace and was connected with Belfast. Beyond that, I do not think that she had any very clear idea in her mind. That is rather indicated by the pencil note which was found after her death. At any rate I cannot say that by the description, "the Peace Society of Belfast," the lady meant the Belfast Branch of the League of Nations Union; but there is enough in this case to enable me to say that, although there is no gift to any existing society, the gift does not fail. It is a good charitable gift and must be applied cy-près. The evidence suggests that at some time or other, possibly before the late War, there may have been a society called the Peace Society of Belfast. It is all hearsay evidence; there is nothing in the least definite about it, and it does not satisfy me that there ever was any society in existence which exactly fits the description in this case, and there being a clear intention on the part of the lady, as expressed in her will, to benefit societies whose object was the promotion of peace, and there being no such society as that named in her will, in this case there is a general charitable intent, and, accordingly, the doctrine of cy-près applies.

The next legacy is "to the Peace Society of Dublin the sum of 300*l.*" The claimant to that legacy is a society known as the League of Nations Society of Ireland. The way in which the claim is put is not the same as in the case of the Belfast Society. It is said that there was a society known as the Dublin Peace Society, the name of which was afterwards changed to the Irish Peace Society; that it ceased to exist many years ago and that what was left of its funds was handed over to this new society, when it came into existence, and the old society is now being carried on by the existing society. The evidence does not satisfy me that that is so, and I am

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unable to say that the League of Nations Society of Ireland is entitled to the legacy. Then it is said that since there was at one time a society which answers the description in the will, and has now ceased to exist, there is a lapse and the legacy fails. I think that it is very probable that, if there was now a society in existence known as the Dublin Peace Society, having regard to the evidence here, such a society would have had little difficulty in establishing that it was the society which the lady intended to benefit; but the evidence shows that there never was a society which answered the exact description in the will, "the Peace Society of Dublin." It is also clear from the memorandum which the lady left, which was found after her death, that her ideas as to any particular society which she desired to benefit by this gift were extremely vague; her one idea seems to have been to benefit any society whose object was the promotion of peace which was connected with Dublin. Under those circumstances, there never having been any society which exactly answers the description in the will, this again is a case where the doctrine of cy-près applies.

Solicitors: *Barlow, Lyde & Gilbert, for Wilmshurst & Kaye, Huddersfield; Waterhouse & Co.; Peake & Co.; G. H. Mennell; The Treasury Solicitor.*

P. J. B.

In re VERNON HEATON COMPANY, LIMITED.

BENNETT J.
1935
Dec. 16

[No. 00569 of 1934.]

Company—Winding-up—Share capital exceeding 10,000*l.—Transfer of liquidation from High Court to County Court—Companies Act,* 1929 (19 & 20 *Geo.* 5, *c.* 23), *ss.* 163, 165—*Companies (Winding-up) Rules,* 1929, *r.* 43.

The High Court has jurisdiction to transfer winding-up proceedings from the High Court to any court which has jurisdiction to wind up companies, and can transfer proceedings in the winding-up of a company with a capital exceeding 10,000*l.* to a county court having winding-up jurisdiction.

In re Real Estates Co. [1893] 1 Ch. 398 distinguished.

SUMMONS.

An order was made in 1934 by the High Court for the compulsory winding-up of Vernon Heaton Co., Ld., and a liquidator was duly appointed. The paid-up capital of the company exceeded 10,000*l.*

In April 1935, on the application of the liquidator, an order was made transferring the proceedings in the winding-up to a county court.

A summons in the winding-up was issued on behalf of a creditor, and at the hearing thereof on July 30, 1935, the county court judge refused to deal with the matter raised in the summons, on the ground that, since the paid-up capital of the company exceeded 10,000*l.*, he had no jurisdiction to do so.

An application was subsequently made to the High Court by the creditor for the restoration and retransfer of the proceedings to the High Court.

Andrew Clark for the applicant. The expression "the court" used in relation to a company is defined in s. 380 of the Companies Act, 1929, as "the court having jurisdiction to wind up the company." There is nothing in the context of s. 177 to give the words any other meaning than that given in s. 380. The same applies to ss. 191, 275 and 276. The words "the court" have the same meaning in the winding-up rules as they have in the Act. The county court judge has no power to hear any application. This is, therefore, a proper case for retransfer under r. 43. This application is made under r. 106.

The Court can exercise its general jurisdiction if, as in the present case, there is good cause for dealing with the summons. The applicant cannot obtain adjudication of his claim in the county court (1.) because the county court judge has refused to entertain it and (2.) because he has no jurisdiction to hear any application.

J. B. Lindon for the liquidator. The scheme of the Act is plain from ss. 163 and 165. Sect. 163, sub-s. 1, gives to the High Court complete jurisdiction over winding-up proceedings. Sub-ss. 2, 3 and 4 give limited jurisdiction to other courts. Sub-s. 5 enables the Lord Chancellor to exclude a county court. It was to a case of this kind that *In re Real Estates Co.* (1) was directed. From sub-s. 6 it is clear that the county court has jurisdiction to wind up a company. Sub-s. 7 is most important, as it provides that nothing in the section shall invalidate a proceeding by reason of its being taken in a wrong court. The High Court can never be the wrong court.

Sub-s. 7 validates any act done by the county court judge notwithstanding that the court is the wrong court. In the rules there is a distinction between "the court" and "the High Court"—see r. 43; see also r. 24, where it is indicated that the county court has jurisdiction to wind up a company.

BENNETT J. In this case I propose to decide that the court has jurisdiction to transfer winding-up proceedings from the High Court to any court which has jurisdiction to wind up companies. This decision is the only possible one in view of the orders that have been made since the Companies Act, 1929, came into force. *In re Real Estates Co.* (1) is only applicable in a case where the court to which the proceedings are proposed to be transferred has no jurisdiction to wind up at all. The present case is not a case of that kind. The county court to which the winding-up proceedings were ordered to be transferred has jurisdiction to wind up companies. If the county court judge has said that he is not going to deal with the matter because he has no jurisdiction, the remedy is not to transfer the proceedings back to the High Court, but to apply for a mandamus. I hold that there was jurisdiction under s. 165 to transfer the winding-up proceedings to the county court, following, as I have said, numerous orders made by judges of the High Court who since the Act of 1929 came into force have had charge of the company work.

The application must, therefore, be refused.

Solicitors: *Gregory, Rowcliffe & Co., for Clutterbuck, Trevenen & Mawson, Carlisle; Stafford Clark & Co.*

J. L. D.

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(1) [1893] 1 Ch. 398.

C. A.

1935

CLAUSON
AND
LUXMOORE
JJ.

Oct. 29, 30.

C. A.

Dec. 17, 18.

In re A DEBTOR.

[No. 24 of 1935.]

Bankruptcy—Judgment recovered against firm — Bankruptcy notice addressed to firm—Service of notice on one partner only and not at firm's place of business—Right to Receiving Order against partner served—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *ss.* 1, 2; *s.* 5, *sub-s.* 3.

Where judgment for a debt has been recovered against a firm and a bankruptcy notice in the usual form and following the judgment has been served on one of the partners only at a place other than the principal place of business of the firm and has not been complied with, a receiving order can properly be made against that partner on the judgment creditor's petition.

In re Low. Ex parte Gibson [1895] 1 Q. B. 734 and dictum of Wright J. in *In re Wenham. Ex parte Battams* [1900] 2 Q. B. 698, 701 applied.

So *held* by the Court of Appeal (Lord Wright M.R., Romer and Greene L.JJ.) affirming the judgment of the Divisional Court (Clauson and Luxmoore JJ.).

THE petitioning creditors on November 21, 1933, recovered judgment for 403*l.* 7*s.* 2*d.* and costs against a firm of tea merchants, carrying on business in the City of London under the style of "Robert Jackson & Co." The firm consisted of two partners, one of whom was George Frederick Wyatt, the debtor.

On April 23, 1935, a bankruptcy notice dated April 4, 1935, and addressed to the firm was served by the creditors upon the debtor, at a place other than the place where the firm of which he was a member carried on business, so that r. 279 of the Bankruptcy Rules, 1915 (1), did not apply. On May 24, 1935, in consequence of the failure of the debtor to comply with the bankruptcy notice, a petition was presented by the judgment creditors for a receiving order against him.

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(1) Rule 279: "Any notice . . . . for which personal service is necessary shall be deemed to be duly served on all the members of a firm if it is served at the principal place of business of the firm in England, on any one of the partners, or upon any person having at the time of service the control or management of the partnership business there."

On July 18, 1935, the petition came before the Registrar of the Chelmsford County Court and was adjourned until August 15, 1935. A preliminary objection was taken that, as the notice was addressed to the firm, there was no foundation for a receiving order against the debtor, an individual partner in the firm, notwithstanding that it had been served upon him personally, unless there was evidence before the court that the notice had also been served upon the other partner. The Registrar overruled the preliminary objection, but dismissed the petition under s. 5, sub-s. 3, of the Bankruptcy Act, 1914 (1), on the ground that for other sufficient cause (which, for the purpose of this report, it is not necessary to state) no order ought to be made.

The petitioners appealed and asked that the order of the Registrar should be reversed and that a receiving order might be made against the debtor.

J. B. Blagden for the appellants. The Registrar rightly decided against the preliminary objection. When there has been a judgment against a firm and a bankruptcy notice addressed to the firm has been served personally upon an individual member of the firm, although at a place other than the principal place of business of the firm, and a petition has been presented against that member so served, a receiving order may be made against him: *In re the Debtors* (No. 807 of 1922) (2); dictum of Wright J. in *In re Wenham* (3); *In re Low.* (4)

B. M. Cloutman for the respondent. The preliminary objection is a sound one. The judgment here was a joint one against the firm: the bankruptcy notice, though addressed to the firm, not having been served upon the firm but upon one individual member only, there was no act of bankruptcy on the part of the firm through non-compliance with that notice; and unless the notice was served upon the firm there was no foundation for the making of a receiving order: *Clarke* v. *Clement & English* (1), where a writ of capias ad satisfaciendum having been issued by way of joint execution against the two defendants, it was held that a separate writ of ca. sa. could not be issued against one of them. In *In re Wenham* (2) the notice was served upon each member of the firm.

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(1) Sect. 5, sub-s. 3: "If the court is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the court may dismiss the petition."

(2) [1922] 7 B. & C. C. R. 119.

(3) [1900] 2 Q. B. 698, 701.

(4) [1895] 1 Q. B. 734, 736, 737.

[CLAUSON J. referred to Order 48A, r. 8 (*b*), which provides for separate execution against a partner when judgment has been obtained against a firm.]

CLAUSON J. The petitioning creditors in this case are the creditors of a firm of Robert Jackson & Co. in which there were two partners, Mr. George Frederick Wyatt and Mr. Herbert F. Philpot.

Judgment was obtained in an action by them against the firm and it is in respect of that judgment that a receiving order is now sought against one of the partners in that firm—namely, Mr. G. F. Wyatt.

On the petition for a receiving order coming before the Registrar of the Chelmsford County Court a preliminary objection was taken which the Registrar overruled. The bankruptcy notice was addressed to the firm and was served on this individual partner, who is now the respondent to the petition for a receiving order. The objection taken before the Registrar and now taken before us is that, as the bankruptcy notice was addressed to the firm, it was not a good foundation for a receiving order against an individual partner in the firm, notwithstanding that it had been served upon that individual partner, unless it had also been served upon the other partner in the firm. In my judgment the Registrar rightly overruled the objection. The exact point was the subject-matter, not of a decision but of a dictum of Wright J.

(1) (1796) 6 T. R. 525.

(2) [1900] 2 Q. B. 698, 701.

as long ago as the year 1900 in the case of *In re Wenham* (1), where the learned judge (sitting in the Divisional Court in Bankruptcy) points out that it is essential, in order to found a petition for a receiving order upon a bankruptcy notice addressed to a firm and served upon the individual partner who is sought to be made bankrupt, first of all, that the notice should follow the form of the judgment—as in this case it did—and, secondly, that it should be served personally upon the partner whom it is sought to make bankrupt. It is clear that, in the view of Wright J., proof of service of the notice on the other members of the firm was not a necessary preliminary to obtaining a receiving order against the individual member who had been served. In my judgment this case is covered by that dictum, and the judgments of the members of the Court of Appeal, when the case came before them on appeal from the Divisional Court, seem to indicate that certainly Lord Alverstone M.R. and, I think, also Rigby L.J., had they considered it necessary to deal with the matter, would have been of the same opinion as Wright J. For myself I can see no ground for any suggestion that that dictum was wrong; but, even if I felt some doubt about it, I need scarcely say that, as it is a matter of the highest technicality, I should hesitate to disregard a dictum, thirty-five years old, of such an eminent bankruptcy judge as Wright J., a dictum which I have no doubt has been followed in practice during that long period. In my judgment, accordingly, the Registrar was right in overruling the objection.

LUXMOORE J. I agree.

Their Lordships, overruling the Registrar, held that no sufficient cause was shown why a receiving order should not be made.

H. C. H.

C. A.

The debtor appealed. The appeal was heard on December 17 and 18, 1935.

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(1) [1900] 2 Q. B. 698.

B. M. Cloutman for the appellant.

J. B. Blagden for the respondents.

The arguments were substantially the same as before the Divisional Court.

Lord Wright M.R. This is an appeal from an order of the Divisional Court who reversed an order of the Registrar made in certain bankruptcy proceedings. The Registrar had refused to make an order on the creditors' petition and the Registrar in so refusing acted under that part of s. 5, sub-s. 3, of the Bankruptcy Act, 1914, which says that the Court may dismiss the petition if for other sufficient cause no order ought to be made. The question is whether the discretion vested in the Registrar was correctly exercised. The Divisional Court has held that it was not correctly exercised and that the petition ought not to have been dismissed and this Court has now to decide whether in its judgment the Divisional Court was or was not right. The position has become very complicated in the process of time and in its progress through different Courts, but certain questions have emerged and they are, I think, the only questions which I need deal with, or certainly which I intend to deal with, in this judgment. It is because of the view I have formed on these questions that I have come to the conclusion that the judgment of the Divisional Court was right and that it should be affirmed.

The first question which I have to consider has reference to the form of the bankruptcy notice considered along with the other relevant proceedings in the case. Having come to a conclusion on that, I shall deal with the second question, whether there was sufficient cause for dismissing the petition in the conduct of the petitioning creditors in connection with the petition itself or, rather, in connection with the antecedent dealings with the debtor—whether in fact there has been any misconduct or extortion in regard to the debt in question. [His Lordship then stated the facts.]

Let me now consider the form of the documents relating to the petition now in question. Judgment was obtained against Robert Jackson & Co. (a firm). A bankruptcy notice based on that judgment dated April 4, 1935, was issued. It follows the terms of the judgment, is addressed to Robert Jackson & Co., and says: "Take notice that within seven days after service of this notice on you . . . . you must pay to" the petitioning creditors or their agents "the sum of 459*l.* 10*s.* 11*d.* . . . . as being the amount due on a final judgment obtained by them against you in the High Court of Justice King's Bench Division dated 21st November 1933 whereon execution has not been stayed or you must secure or compound for the said sum to their satisfaction or to the satisfaction of their said agent or to the satisfaction of this Court; . . . ." That notice was served on George Frederick Wyatt, a partner in the firm, at an address other than the place of business of the firm. It was not complied with and it was followed by the petition dated May 29, 1935, addressed to George Frederick Wyatt, that is the debtor, formerly trading in partnership as Robert Jackson & Co. and lately carrying on business at an address in Southwark. It states that the debtor, George Frederick Wyatt, "failed to comply before Wednesday the 1st day of May 1935 with the requirements of a bankruptcy notice duly served upon him on Tuesday the 23rd day of April 1935." It appears therefore that that bankruptcy notice followed the terms of the judgment. The bankruptcy notice was served upon Wyatt personally.

It is said that the notice was invalid because it ought to have been served upon both partners, whereas it was only served upon one partner—namely, the debtor. Certain authorities have been referred to, but before I deal with them I should like just to refer to the terms of the Act which define what constitutes an act of bankruptcy. Sect. 1 of the Bankruptcy Act, 1914, provides: "A debtor commits an act of bankruptcy in each of the following cases:— . . . . (*g*) If a creditor has obtained a final judgment or final order against him for any amount, and, execution thereon not having been stayed, has served on him in England . . . . a bankruptcy notice . . . . and he does not, within seven days after service of the notice, in case the service is effected in England,

. . . . either comply with the requirements of the notice or satisfy the court that he has a counterclaim . . . ." Those are the conditions which constitute an act of bankruptcy. Here there has been a final judgment or order against the debtor. It is perfectly true that in form the judgment was against a firm of Robert Jackson & Co. of which the debtor was a partner, but none the less it is a judgment against the debtor in his capacity of a partner. He is jointly and severally responsible for all the debts of the firm; and each debt, including this judgment debt, may be enforced against him individually, and, therefore, is a final judgment against him even though it is also a judgment against someone else. Execution has not been stayed. There has been served upon that debtor a bankruptcy notice and he has not within seven days after service of the notice complied with its terms in any way. It seems, therefore, on that analysis of the position, that the matter was complete and in order. Then s. 2 of the Act provides: "A bankruptcy notice under this Act shall be in the prescribed form and shall require the debtor to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order, or to secure or compound for it to the satisfaction of the creditor or the court, and shall state the consequences of non-compliance with the notice, and shall be served in the prescribed manner." The form in this particular case is beyond question as prescribed. It is said, however, that it is not in order because the judgment, being against joint debtors, that is against the firm, the bankruptcy notice ought to be served on each of those debtors individually. No authority has been produced for that proposition and, as I have already indicated, there does not seem to be any foundation for it in the terms of the Bankruptcy Act.

So far as authority goes, I find in *In re Low* (1) an authority which, though dealing not with partnership but with joint debtors, seems to me to point to the directly opposite conclusion. In that case there was an application to set aside a bankruptcy notice. It appeared that an action had been

(1) [1895] 1 Q. B. 734.

brought against the debtor and five other persons and judgment recovered against the debtor and three of his co-defendants, so that there was judgment against four debtors. " A bankruptcy notice served on the debtor stated that the judgment had been recovered against the debtor and all the five co-defendants." That was an irregularity which could be cured and I disregard that. But there was a further point. It was held there that " where judgment has been recovered against several persons jointly, a bankruptcy notice may be issued against one of the joint judgment debtors without including the others." Lord Esher M.R. said this (1) : " The other point raised is not one on which the notice should be set aside. It is said that where the judgment is a joint one against several defendants, a bankruptcy notice cannot be effective except it is drawn up against all the defendants, although it need only be served on the one whom it is desired to make bankrupt. I fail to see what good it can do that one to have the names of the others put in the notice when there is absolutely no necessity for serving it on them. This is a technicality to which we ought not to listen " ; and Rigby L.J. said (2) : " As to the other point raised "—that is the point which is material here—" I cannot understand why it should be obligatory on a judgment creditor to add to the bankruptcy notice the names of all the persons against whom the judgment was recovered when it is not his intention to follow it up against any of those persons except the one whom he proposes to serve." That obviously is not quite in point here because the names of all the debtors were set out in the bankruptcy notice although it was only issued against and served upon the debtor against whom it was the creditors' intention to pursue the matter. But the Court of Appeal there are taking the view that all that is material is that the person against whom it is intended to proceed in bankruptcy should have the bankruptcy notice served upon him and that was done in this case.

The other case is *In re Wenham* (3), which has also been relied upon. There two persons had been carrying on business in partnership. A writ had been issued and served on each of them and the bankruptcy notice, following the judgment, was addressed to Wenham Brothers. It was served personally on each of the partners. A question was then raised which is dealt with by Wright J. in this way (1): " Was it possible to issue a good bankruptcy notice against the firm, the partnership having been dissolved ? The bankruptcy notice followed the judgment, being addressed to the firm by the firm name. In the Bankruptcy Rules there is no express provision dealing with the case, nor is there any decision since Order XLVIIIA was passed. The point would be one of some difficulty but for two circumstances : first, the bankruptcy notice followed the form of the judgment ; and, secondly, it was served upon John Wenham personally." He was the debtor in this bankruptcy. " Looking at the substance of the matter, I think we ought to hold that enough has been done here—that in such a case as the present a bankruptcy notice which follows the form of the judgment is good if it has been served upon the person sought to be affected by it. If the bankruptcy notice be good, there is no reason why a bankruptcy petition should not be presented against either of the brothers Wenham." The learned judge there is in express terms, though it was not necessary for his judgment, treating the service upon the debtor whom it was sought to make bankrupt as being all that was necessary ; and that agrees, in my judgment, with the view which is expressed, or if not expressed certainly implied, in the passages which I have read from *In re Low.* (2) I think that statement of the law is correct.

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(1) [1895] 1 Q. B. 736.
(2) Ibid. 737.
(3) [1900] 2 Q. B. 698.

It is perfectly true that the form which is used is not altogether apt and that the terms of the petition are a little difficult to apply as indeed are the terms of the bankruptcy notice. The bankruptcy notice is addressed to two people under the style of Robert Jackson & Co. and says : " Take notice that within seven days after service of this notice on you." It was not served on the firm because it did not exist

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(1) [1900] 2 Q. B. 701.

(2) [1895] 1 Q. B. 734.

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at the material date and in any case had then no principal place of business. Thus it could only be served on one or other of the debtors or both of them if they could be caught together. "Take notice that within seven days after service of this notice on you, excluding the day of such service you must pay" the amount. It may be asked, what is the position if the debtor who is not served actually pays the debt within seven days? That I think is a simple matter, because then there would be no debt and the notice would have become abortive. A more difficult position, however, would arise if the other debtor on whom the petition was not served had secured the sum to the creditors' satisfaction or to the satisfaction of the Court. That difficulty I think could be met only by saying that in that case the debtor on whom the notice was served would be entitled to rely on what had been done by his co-debtor. Each is a debtor and each is severally liable for the debt: but each is entitled to rely on what his co-debtor has done. There are perhaps other difficulties; but there are more serious difficulties in dealing with the matter on any other footing, and I think that the bankruptcy notice here and the petition founded upon it were in order and that no objection can be raised on that ground.

[His Lordship then proceeded to deal with the further point which is not the subject of this report, and in the result dismissed the appeal.]

ROMER L.J. I agree entirely and I only desire to add this. In *In re Low* (1), where a judgment had been obtained by the petitioning creditor against several joint debtors, the bankruptcy notice was addressed to one only of those joint debtors. The debtor on the petition coming on took the objection that the bankruptcy notice ought to have been addressed to all the joint debtors. Mr. Muir Mackenzie in the course of his argument on behalf of the debtor said: "The notice should be directed to the debtor and all the other joint judgment debtors, although it need not be served on those against whom it is not intended to proceed"; and Lord

(1) [1895] 1 Q. B. 734.

Esher M.R., as I read the passage in his judgment, which has been already read by the Master of the Rolls and which I need not repeat, affirmed the accuracy of that argument on the part of Mr. Muir Mackenzie to this extent, that if all the joint debtors had been mentioned in the notice, and the notice was directed to them all, it was only necessary to serve the one against whom it was intended to proceed. Apart from that altogether it appears to me in the present case that every single condition that is mentioned in sub-s. 1 (*g*) of s. 1 and in s. 2 of the Bankruptcy Act, 1914, as essential to the establishment of an act of bankruptcy under sub-s. 1 (*g*) has been fulfilled. [His Lordship then discussed the point not calling for report.] I agree that this appeal fails.

Greene L.J. I agree, and although at one stage in the argument I felt some little doubt on the question of the bankruptcy notice, on careful consideration I have come to the conclusion that that doubt is without foundation. It appears to me that the bankruptcy notice when properly construed must be taken as a notice addressed to each individual member of the firm, and it is, I think, completely accurate to say that the individual on whom it was in fact served has failed to comply with the requirements of the notice, in so far as it related to his own actions which under it he was required to perform. If in point of fact his partner, not having been served, had nevertheless paid the debt, it appears to me that even that would have been a compliance by the debtor, who was in fact served, and the result would have been that the allegation in para. 4 of the petition that he—namely, the debtor against whom the petition was presented—had failed to comply with the notice could not have been made, because payment by the other partner would have been a payment by the debtor. For these reasons the doubts which I at one time felt appear to me to be groundless and I agree entirely with the judgments which have been delivered.

Appeal dismissed.

Solicitors for the petitioners: *Aukin & Co.*
Solicitor for the debtor: *Stanley S. Levene.*

H. C. G.

WITTY *v.* WORLD SERVICE, LIMITED.

EVE J.

1935
Dec. 13.

[1935. W. 3649.]

Gaming—Newspaper Competition—Picture Puzzle—Solution not predetermined—Success dependent on exercise of a "substantial degree of skill"—Competition not illegal—Betting and Lotteries Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 58), *s.* 26, *sub-s.* 1 (*b*)—*Betting Act,* 1853 (16 *&* 17 *Vict. c.* 119), *s.* 1.

A competition was advertised in a newspaper in which a money prize was offered to the reader sending in the best solution of a picture puzzle illustrated in the same issue. The puzzle consisted of a set of nine small sketches each intended to depict the name, as spelt or pronounced, of some place in the United Kingdom. A list of names providing clues was given. Competitors were required to fill in blank forms with their solutions and send them in to the editor with entrance fees. The artist who drew the sketches was instructed to make some of them capable of representing one or other of two or three different places. In an action brought to test the legality of the competition:—

Held, that success in the competition depended on the exercise of a substantial degree of skill, there being no predetermined solution of the puzzle, and therefore it did not come within the prohibition contained in s. 26, sub-s. 1 (*b*), of the Betting and Lotteries Act, 1934.

Held, also, that the competition was not a "game" within the prohibition of s. 1 of the Betting Act, 1853.

Coles v. *Odhams Press, Ld.* [1936] 1 K. B. 416, distinguished.

ACTION.

The defendant company, which was incorporated in 1923 for the purpose of carrying on business as proprietors and publishers of newspapers, journals, magazines, etc., was the publisher and printer of a weekly newspaper called the Winner. On November 18, 1935, the defendant company published in the Winner particulars of a competition under the heading "Great new picture puzzle contest. 50*l.* cash must be won." The particulars followed: "Below are printed nine pictures representing the names of places in the United Kingdom (either as spelt or pronounced). There may be more than one place suggested by a picture, but upon examination of all the details in the picture you will find one name more fitting than others. You are invited to state what are the most fitting answers to the pictures. All you have to do is to study each picture carefully and determine what place in your knowledge most aptly fits the picture. There are no sealed solutions to guess. The more skilful and thoughtful you are the more likely you will be to gain the prize. Every attempt will be individually scrutinised by a Board of Adjudicators presided over by the editor of the Winner who will present a prize of 50*l.* in cash for the most meritorious attempt submitted."

The rules further stated that there was no official solution to the puzzle, and that each and every attempt would be individually scrutinized. In the event of equally meritorious attempts being submitted by more than one entrant, the prize would be equally divided. Attempts were to be made at the rate of one for 1½*d.*, or five attempts for 6*d.* The form provided for five attempts at solving the nine pictures. Of these, the first three were diagrams incorporating some of the letters of the words London Belfast and Cardiff respectively, and the word "London" was printed as the solution of the first picture. The other six pictures were sketches with no immediately obvious meaning. In the margin there was printed "a list of places to help competitors," with the intimation that they might probably find better ones than those suggested.

The plaintiff was one of the directors of the defendant company, and being doubtful whether the competition was one rendered illegal by the Betting and Lotteries Act, 1934, in which event he would become liable under s. 29 of the Act to certain penalties if the defendants were prosecuted and convicted under the Act, brought this action against the defendants claiming an injunction restraining them from conducting in the Winner any picture puzzle contest or other competition in which prizes were offered for forecasts of the result of a future event, or in which success did not depend to a substantial degree upon the exercise of skill, contrary to the provisions of ss. 22 and 26 of the Betting and Lotteries Act, 1934, and also an injunction restraining the defendants from keeping or using offices for the receipt of money as consideration for any promise to pay money on any event or contingency relating to any game or exercise contrary to the provisions of s. 1 of the Betting Act, 1853. The editor, Mr. C. B. Randall, made an affidavit in which he admitted the truth of the facts stated by the plaintiff in his affidavit, and further said that he had instructed an artist to draw the pictures which appeared in the Winner suggesting in some cases two or more different places to each picture, but always in such a way that the place the name of which he (the editor) had communicated to the artist appeared to be the most fitting answer in the sense that it took the most comprehensive account of the material contents of the picture. For instance, one of the pictures suggested six possible solutions, but one, in the editor's opinion, was the most appropriate. The editor further said that it was his intention to continue to publish the competition in the present form, being advised that it did not offend against either ss. 22 or 26 of the Betting and Lotteries Act, 1934 (1), and was not a game or exercise within s. 1 of the Betting Act, 1853.

P. B. Morle for the plaintiff. Two questions arise on this motion: (1.) Is the competition in the Winner one in which success does or does not depend in a substantial degree on the exercise of skill? and (2.) Is the defendants' place of business an office or place where money is received in connection with a game within the prohibition of s. 1 of the Betting Act, 1853?

I submit that the present case is covered by the decision of the King's Bench Division in *Coles* v. *Odhams Press, Ld.* (2) It is not necessary to contend that the competition is a lottery, but it is indistinguishable from that case on the facts. These pictures are drawn to represent places already determined on, but some of them may equally well represent other places. To use the words of Lord Hewart in that case, the competitors are asked to " make blind shots at a hidden target." The competitors enter a competition the solution of which has already been found. Success in the competition is not the reward of skill, but depends on the competitor guessing correctly at the instructions given to the artist who draws the sketches. In *Scott* v. *Director of Public Prosecutions* (1), a case under the Lotteries Act, 1823, the competition was a genuine literary effort, and the Court held that it involved skill.

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(1) Betting and Lotteries Act, 1934, s. 26, sub-s. 1: "It shall be unlawful to conduct in or through a newspaper, or in connection with any trade or business or the sale of any article to the public—

(*a*) any competition in which prizes are offered for forecasts either of the result of a future event, or of a past event the result of which is not yet ascertained or not yet generally known;

(*b*) any other competition success in which does not depend to a substantial degree upon the exercise of skill."

(2) [1936] 1 K. B. 416; 52 Times L. R. 119.

Further, this is also a game within s. 1 of the Betting Act, 1853, and the place where the entries are received is an office where money is received in connection with the game: see *Peers* v. *Caldwell* (2); *Bennett* v. *Ewens*. (3)

The best solution of the puzzle will not necessarily win the first prize, because it may not correspond with the predetermined solution. To win a prize that must be successfully anticipated.

Gilbert Beyfus K.C. and *Walter Frampton* for the defendants. It is correct to say that the artist is invited to draw nine sketches to represent the names of two or more places each. In the result the best solutions win, for a competitor may discover a name for one of the pictures which is even more appropriate than that originally suggested to the artist. This meets one of the objections to the competition urged in *Coles* v. *Odhams Press* (4) and that case is therefore distinguishable. The nine pictures in the Winner represent at least thirty possible places. There is no evidence that reasonable skill is not necessary to success. There is no secretly fixed standard at which competitors must aim. The case comes within the decision in *Scott* v. *Director of Public Prosecutions*. (1)

[EVE J. I hold that this is not a " game " within s. 1 of the Betting Act, 1853.]

(3) [1914] 2 K. B. 868.
(4) [1916] 1 K. B. 371.
(5) [1928] 2 K. B. 510.
(4) [1936] 1 K. B. 416; 52 Times L. R. 119.

Morle in reply. The skill used, if any, has no real effect on the result. The difference between this case and *Coles* v. *Odhams Press* (1) is merely colourable.

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EVE J. This is a case in which I should be very sorry to set up my own opinion against the opinion of a tribunal so much more used to dealing with these questions of betting and matters of that sort than this Court, but at the same time, having arrived at a conclusion, which may or may not be a right one, I think it my duty to state it.

The nature of the competition appears from studying the notice in the paper, which describes the way in which it is conducted, and in which the result is arrived at. This must be taken as accurately described in the plaintiff's affidavit. As a result of these documents and of the arguments which have been addressed to me, I cannot help thinking that Mr. Morle is right when he says that there is an attempt to introduce matter into the competition to evade the mischief to which the competition might be subjected if it was treated as coming within the judgment in *Coles* v. *Odhams Press, Ld.* (1)

Speaking for myself, I do not appreciate to the full the answer which Mr. Morle has made to the suggestion that the present case stands on a different footing from *Coles* v. *Odhams Press, Ld.* (1), by reason of the fact that skill is imported into it. The way I approach the subject is this. I ask myself whether this is a competition success in which depends on the exercise of skill. The words are few, but very often a few words are pregnant with suggestion of what the interpretation of them is. The framer of this scheme must, I think, have had in mind the necessity of making it a scheme which would be consistent with the judgment to which reference has been made, and he was no doubt as fully aware as Mr. Morle of the difficulties with which the promoters were faced in *Coles* v. *Odhams Press, Ld.* (1)

Here I am limiting myself to the question whether, if this competition were put forward as a competition initiated and conducted as has been detailed, the Court would not put

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(1) [1936] 1 K. B. 416; 52 Times L. R. 119.

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to itself the question, and the only question which is material: Is this a competition which involves the exercise of skill on the part of those who attempt to solve it? In my view, it is. I think these pictures would require a great deal of skill to be exercised by the person solving them. No doubt there is a class of person who gets so used to solving such problems that they do not present the same difficulty to him as they do to an ordinary mortal, but, speaking for myself—and I have some puzzles even in my daily work here—I should find it a very difficult thing to say what the complete solution of this puzzle is.

In my opinion, the question is whether the competition involves skill; and it seems to me that the manner in which it is managed and the way in which the attempts at solution are investigated are of no particular application here. All I have to do is to see whether it comes within the section of the enactment which says that it shall be unlawful to conduct in or through any newspaper any competition success in which does not depend to a substantial degree on the exercise of skill. Here, I think, the solution does depend on the exercise of considerable skill, and in those circumstances I do not feel justified in saying that it is within the mischief of s. 26, sub-s. 1 (*a*) and (*b*), of the Betting and Lotteries Act, 1934.

I have already said that, in my opinion, it is not a game within s. 1 of the Betting Act, 1853, and it is a competition. Throughout, there has been a distinction made between game and competition, and I should therefore not be prepared to hold the word "game" as covering such a competition as this, in the absence of any authority to that effect. The motion will be dismissed.

Solicitors: *Samuel Coleman*; *Amery-Parkes & Co.*

H. L. L.

In re CANNING'S WILL TRUSTS.
SKUES *v.* LYON.

[1935. C. 1651.]

FARWELL J.
1935
Nov. 19.

Will—Construction—Rule against Perpetuities.

Limitations, in themselves valid, which follow, but are not dependent upon, limitations offending the rule against perpetuities, are not affected by the invalidity of the prior limitations.

ADJOURNED SUMMONS.

By his will, dated January 26, 1911, the testator appointed executors and trustees, and devised all his lands in Ireland and all his live stock and chattels to his trustees upon trust that they should stand possessed of the live stock and chattels upon trust for the person or persons who should first become entitled under the trusts thereinafter contained to his real estate as tenant for life or in tail and subject to similar trusts as to management by his trustees or trustee during the life of Alick William Wittit Lyon (hereinafter referred to as "Captain Lyon") as were thereinafter contained with reference to his real estate. The testator then directed that his trustees or trustee should stand possessed of his real estate upon certain trusts therein mentioned during the life of Captain Lyon and after his decease then (as to both the capital and income of the trust premises) in trust for all or any of the children or remoter issue of Captain Lyon for such estates, interests and shares as Captain Lyon should by will or codicil appoint and in default of, and subject to, such appointment in trust for the first and other sons of Captain Lyon successively in tail with remainder to the first and every other daughter of Captain Lyon successively in tail with remainder in trust for all or any of the sisters of Captain Lyon and their children or remoter issue for such estates, interests and shares as Captain Lyon should by will or codicil appoint and in default of, and subject to, such appointment in trust for his sisters successively in remainder according to seniority in tail and the testator declared that if there should be a failure of issue of all of them, Captain Lyon and his sisters, then his trustees or trustee should, after the decease of the last survivor of them, stand possessed of the testator's real estate and premises in trust for such persons or person, for such estates or interests and subject to such powers and provisions as Captain Lyon should by will or codicil appoint. The testator, having made provisions for the payment of certain annuities and bequeathed a number of legacies, gave and bequeathed the whole of his residuary personal estate to his trustees or trustee upon trust to sell, call in and convert the same into money and out of the moneys to arise therefrom pay his funeral and testamentary expenses and invest the residue and at their or his absolute and uncontrolled discretion apply the income of the residuary moneys and the investments thereof in managing, maintaining and keeping up his mansion house at Rostrevor in manner thereinbefore directed during the life of Captain Lyon, so long as any person entitled to the possession or receipt of the rents and profits thereof should be under twenty-one years of age and, subject thereto, his trustees or trustee should stand possessed of his residuary personal estate, as to capital and income, upon trusts corresponding as nearly as possible to the trusts thereinbefore declared concerning his real estate and so as to follow and be enjoyed with his real estate.

The testator died on April 22, 1916, having executed three codicils, the provisions of which were not material to this case.

Captain Lyon died on August 19, 1934, a bachelor, without having effectually exercised any of the powers conferred on him by the testator's will. He had two sisters only, the defendants Marianne Constance Emmeline Lyon and Rosabelle Maud Gwendoline Lyon of whom M. C. E. Lyon was the elder. By a disentailing deed, dated February 25, 1935, and duly enrolled, M. C. E. Lyon barred her estate tail in the proceeds of sale of such part of the testator's real estate as had been sold and capital moneys, and became entitled thereto in fee simple and absolutely. If the bequest of the residuary personal estate was valid, M. C. E. Lyon was entitled thereto subject to a charge in favour of R. M. G. Lyon by virtue of certain documents not material to this case.

A doubt having arisen as to the validity of the bequest of the residuary personal estate, the present trustees took out this summons asking whether upon the death of Captain Lyon without issue such estate became and was held on trust for M. C. E. Lyon absolutely, subject only to any charge created in favour of R. M. G. Lyon, or whether the trusts of such estate subsequently to the death of Captain Lyon were wholly or to any and what extent invalid as infringing the rule against perpetuities and such estate was undisposed of by the will and devolved as on the intestacy of the testator.

The remaining two defendants were the executors of Conway Canning, the only brother and sole next-of-kin of the testator, who died on February 19, 1926.

Wilfrid Hunt for the plaintiffs.

Gavin Simonds K.C. and *H. O. Danckwerts* for the sisters of Captain Lyon.

The gift of the personal estate is given on the trusts of the real estate, which are valid, with a proviso that if the beneficiaries have not attained the age of 21 years the trustees have to apply the income in a certain way. Although the proviso is invalid as offending the rule against perpetuities, the gift, not being dependent on the proviso, is valid: *Webb* v. *Sadler* (1) and *In re Abbott.* (2) The direction for the maintenance of the house and premises at Rostrevor is a mere charge: *In re Clulow's Trust.* (3)

C. J. Radcliffe K.C. and *J. H. A. Sparrow* for the executors of Conway Canning. Limitations that follow prior limitations, void for offending the rule against perpetuities, are also void. They either follow the prior limitations and are bad or they are alternate limitations and are good. The rule is laid down in *In re Thatcher's Trusts* (4), and a useful summary of cases is given by Astbury J. in *In re Hewett's Settlement.* (5) There

(1) (1873) L. R. 8 Ch. 419.
(2) [1893] 1 Ch. 54.
(3) (1859) 1 J. & H. 639.
(4) (1859) 26 Beav. 365.
(5) [1915] 1 Ch. 810, 815.

can be no question here of alternate limitations, and it cannot be seriously said that the prior limitation is a mere charge. The gift of the personal estate is therefore void.

FARWELL J. This summons raises an interesting question on the will of the testator. In my view the question which I have to determine is one of construction of the will, but it involves the consideration of the rule against perpetuities.

The question I have to determine is, what is the effect of the provisions made for the disposition of the personal estate ? It is admitted on all sides for the purpose of this case that the trust, so far as it gives the trustees uncontrolled discretion to apply the income of the said residuary moneys and the investments thereof " in managing, maintaining and keeping up my establishment and mansion house at Rostrevor and the gardens and grounds and farms in manner hereinbefore directed so long as any person entitled to the possession or the receipt of the rents and profits thereof shall be under 21 years of age," is invalid as offending the rule against perpetuities. That gives rise to the question whether the effect of that is to defeat the gift of the personalty which follows after that provision so that the gift fails altogether, with the result that the testator died intestate so far as his personal estate is concerned, or whether the trusts declared of the personal estate take effect notwithstanding the invalidity of the earlier part of that clause in the will.

The first thing to be remembered in construing a will which raises questions as to the rule against perpetuities is, that the will must be construed in the first place without regard to the rule against perpetuities, that is to say, the Court is not entitled to construe the will so as to avoid the rule against perpetuities. Having construed the will and determined what is the effect of the dispositions in it, the Court then has to see whether those dispositions or any of them offend all or any of the rules against perpetuity.

The rule which is applicable in this case is stated accurately in Jarman on Wills, 7th ed., p. 324. It is there stated :

" Where a gift is void for remoteness, all limitations ulterior to and dependent on such remote gift are also void, though the object of the prior gift should never come into existence." Then he cites the well known case of *Proctor* v. *Bishop of Bath and Wells* (1), and goes on, p. 325: " On the same principle, if there is a gift of personal property upon trust for all the children of A., a living person, who are living at the expiration of 28 years from the testator's death, and in default of such children to X., the gift over is void." Then he states the rule as explained by Stirling J. in *In re Abbott.* (2) Stirling J. said: " It is settled that any limitation depending or expectant upon a prior limitation which is void for remoteness is invalid. The reason appears to be that the persons entitled under the subsequent limitation are not intended to take unless and until the prior limitation is exhausted; and as the prior limitation which is void for remoteness can never come into operation, much less be exhausted, it is impossible to give effect to the intentions of the settlor in favour of the beneficiaries under the subsequent limitation." In my judgment, that is the true explanation of the rule which Mr. Jarman has stated in the early part of the passage which I have read. That being so, how is the rule to be applied in this case? Is the trust " corresponding as nearly as possible to the trusts hereinbefore declared concerning my real estate," a trust which is dependent or expectant upon the immediate preceding trust as to the rents during the minority of any one entitled to possession or the receipt of the rents and profits? The fact that the trust for management during minority precedes in the will the disposition of the personal estate is not conclusive. It is a question of construction of the whole clause. In considering this some assistance may be found from such a case as *Re Abbott* (3), where the question turned on a power of appointment. In that case there was a gift over in default of appointment which created vested interests in the persons entitled in default of appointment subject only to be divested by a valid appointment. The exercise of the power in that case was invalid as offending the rule against perpetuities, but notwithstanding that the gift over in default of appointment was held to be good. That case is not wholly analogous to the case I am considering, because there the settlor who created the power gave the property to the persons in default of appointment, subject only to a valid exercise by the appointor, whereas here the question arises wholly out of the disposition of the testator's own property by his will. Nevertheless it is of some assistance as an example of a case where the Court has held that the ultimate trust, that is to say, the trust in default of appointment, is good notwithstanding that the preceding appointment is invalid as offending the rule against perpetuities.

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(1) (1794) 2 H. Bl. 358.
(2) [1893] 1 Ch. 54, 57.
(3) Ibid. 54.

In the present case, if on the true construction of the will the gift of the personalty to the persons who take the real estate is dependent upon and ulterior to the trust which immediately precedes it, then that gift is clearly bad. If, on the other hand, on the true construction of this will, the gift of the personal estate is independent of the earlier trust although intended to be made subject to it, then, in my judgment, the trust for the persons entitled to the real estate is good, notwithstanding that there is intended to be imposed upon it a qualification which is itself ineffective, because the ultimate gift of the personal estate is not a limitation dependent upon or ulterior to the earlier trust.

In my judgment, on the true construction of this will, the effect of this trust is, that this is a gift of the personalty to the persons who are entitled to the real estate. The testator has sought to impose upon that gift a qualification intended to come into operation in certain events. The fact that that provision is invalid in no way invalidates the gift itself, because the gift is not a limitation ulterior to or dependent upon a void limitation. The gift is to the persons entitled to the real estate. The trust by which a qualification is intended to be imposed in certain events is not a trust upon which the gift is dependent or to which it is ulterior. If that be the true construction of the will it must follow that there is no intestacy here and the first defendant is now entitled to the personal estate of the testator.

FARWELL J.
1935
CANNING'S WILL TRUSTS, *In re.* SKUES *v.* LYON.

Solicitors: *Powell, Skues & Graham Smith; Capron & Co.; Hunters.*

P. J. B.

HAYES AND HARLINGTON URBAN DISTRICT COUNCIL *v.* THE TRUSTEE IN BANKRUPTCY OF JESSE WILLIAMS.

FARWELL J.
1935
Dec. 20.

[1934. H. No. 3828.]

Mortgage—Foreclosure Order—Bankrupt mortgagor—Amendment of assessment of value in order—Form of Order—Variation of form in Seton's Judgments and Orders.

A District Council having advanced the sum of 200,000*l.* upon the security of freehold houses, the mortgagor became bankrupt. The council put in a proof for their debts, valuing their security at 160,000*l.*, without obtaining a professional valuation. The council also issued a foreclosure summons against the mortgagor, again valuing their security at 160,000*l.*, and a foreclosure order nisi was made according to the form in Seton's Judgments and Orders, 7th ed., vol. iii., p. 1892, which has been in use in such cases for many years. The order contained a declaration that the plaintiffs were entitled to hold the mortgaged property as security for 160,000*l.* and interest thereon. The council subsequently obtained a professional valuation of the mortgaged property at 200,000*l.*, and they moved in bankruptcy to amend the valuation in their proof. The judge in bankruptcy held that he could not consider the application as long as the valuation of 160,000*l.* in the foreclosure order stood. The council then moved in the Chancery Division for leave to amend the foreclosure order by increasing the valuation to 200,000*l*:—

Held, that the foreclosure order as it stood prevented the council from exercising the right they had in bankruptcy to apply to amend their proof, and that notwithstanding the long period between the date of that order and the date of the application and the long period during which the form of order had been used, it was right to discharge the order and make a fresh order with a declaration that the plaintiffs were entitled to hold the mortgaged properties for the respective amounts of principal and interest due to them upon the security of the mortgages.

MOTION.

On various dates between January 23 and June 21, 1929, Jesse Williams (trading as the Allied Building Corporation) charged by separate deeds by way of legal mortgage 500 freehold houses at Hayes in the county of Middlesex in favour of the Hayes and Harlington Urban District Council (hereafter called "the council") to secure repayment to the council of the several sums of 400*l.* advanced by the council to the said Jesse Williams in respect of each of the said houses together with interest thereon at the rate of 5*l.* 5*s.* per cent. The aggregate amount so advanced and secured by the charges was 200,000*l.*

On November 1, 1934, a receiving order in bankruptcy was made against Jesse Williams. At that time the aggregate amount due to the council for principal and interest was 201,556*l.* 14*s.* 11*d.*

On November 9, 1934, the council received from the Official Receiver in the said bankruptcy a form of proof together with a notice of the first meeting of creditors, which directed the council to lodge the proof of their debt at or before 12 o'clock noon on November 14, 1934. The council were advised that they must value their security for the purpose of the proof. As, owing to the limited time, it was not possible to obtain a valuation by expert valuers, the chairman and treasurer of the council themselves valued the security at 160,000*l.*, which they considered was the amount that the property would fetch on a forced sale, and the proof in which they assessed the value of their security at that sum was lodged on November 14.

Jesse Williams was adjudicated bankrupt on November 22, 1934, and Robert Frederick William Fincham was appointed trustee of his estate. The council proved in the bankruptcy for the sum of 201,556*l.* 14*s.* 11*d.* in respect of their several mortgages, valuing their security at 160,000*l.*, and on

October 29, 1934, the claim was admitted as 41,556*l*. 14*s*. 11*d*., being the difference between the said sums.

The said Jesse Williams had effected second mortgages on the mortgaged property together with other property to the Princes Park Property Trust, Ld. (hereafter called "the second mortgagees"), to secure 120,000*l*.

On November 21, 1934, the council issued this originating summons in the Chancery Division for the enforcement of their several mortgages by foreclosure, still valuing their security at 160,000*l*., and on January 3, 1935, a foreclosure order nisi was made in Eve J.'s Chambers.

The order followed the form given in Seton's Judgments and Orders, 7th ed., vol. iii., p. 1892, which has been in use for many years, and contained a declaration "that as against the trustee in bankruptcy the plaintiffs are entitled to hold the property comprised in the several legal charges as security for 160,000*l*., with interest thereon at the rate at which the plaintiffs valued their security, and the costs of this action." The order appears to have been made on the footing that the plaintiffs were entitled to consolidate their mortgages against the trustee in bankruptcy. The order was duly entered on February 21, 1935.

In July, 1935, the council received information which led them to suspect that they had undervalued their security, and they instructed their solicitors to write to the trustee requesting him to amend their valuation by increasing it to 201,249*l*. 9*s*. 3*d*., which they did on July 29. The trustee replied by letter on August 2 that he was unable to accede to the request, having regard to the foreclosure proceedings and the fact that there was a second mortgagee. At his public examination on August 13 the said Jesse Williams stated that in his opinion 237,500*l*. would be a fair valuation of the mortgaged property.

The council instructed Messrs. Wetherall Green & Smith, surveyors and auctioneers, of Chancery Lane, to make a valuation of the property, and on October 24, 1935, they submitted a report in which they valued the property at 200,000*l*. The council then served upon the trustee a notice of motion in bankruptcy for leave to amend the valuation in their proof and increase it to the sum of 200,000*l.*

The motion was moved before Luxmoore J., sitting as judge in bankruptcy, on November 25, 1935. His Lordship expressed his opinion that it would be of no avail for him to amend the valuation in the proof, even if he thought right to do so, having regard to the declaration in the foreclosure order that as against the trustee the council were entitled to hold the mortgaged property as security for 160,000*l.* only. He adjourned the motion for three weeks to give the council the opportunity to make a proper application in the Chancery Division to discharge or vary the order nisi for foreclosure.

The council then moved before Farwell J. that conditionally upon their obtaining the leave of the judge in bankruptcy to amend the valuation in their proof in the bankruptcy proceedings, the declaration in the foreclosure order should be amended by increasing the amount of their valuation of their security from 160,000*l.* to 200,000*l.*, or in the alternative that notwithstanding the lapse of time they should be at liberty to give notice of appeal against the form of the foreclosure order.

C. Harman K.C. and *G. P. Slade* for the plaintiffs. The form of the order which we ask to be amended has been in Seton's Judgments and Orders for many years, but the point we raise does not seem ever to have been taken and the order as it stands works an injustice. It makes ineffective the right the plaintiffs have in bankruptcy to amend their proof. Luxmoore J. said that as the order stands it prevents the plaintiffs from holding their property as security for more than 160,000*l.*, even if he gave leave to amend the proof. The order having been made in Chambers my application is out of time, but your Lordship has jurisdiction to extend the time if in the circumstances it is just to do so.

[FARWELL J. I have nothing to do with any right you may have to amend your proof. That is a matter for the Bankruptcy Court. I have only to consider whether this order is in a wrong form and whether I am satisfied that as it stands it will work an injustice.]

The equity of redemption is the chief asset in the bankruptcy. If I am bound to prove for all my debt over 160,000*l.* I shall get almost nothing, which would be most unjust to me, and it is a matter of great importance.

[FARWELL J. The question is whether I ought to allow a form of order to stand which in effect deprives you of the advantage of the right to make an application in bankruptcy which is given to you by the Bankruptcy Act.]

We did not know the true value until we had our valuation made, and since then there has been no delay. We have been asking the trustee to amend the valuation in our proof since last July. No injustice will be worked on anybody by this application if granted. The parties will be left as they are, unless we can induce the judge in bankruptcy to alter our valuation. I submit that this is a proper case for your Lordship to exercise your discretion and allow me to move to discharge the order although I am out of time. The other assets are only valued at about 1500*l.* If I am bound to prove for all my debt over 160,000*l.* I shall get almost nothing, so that the matter is of great importance.

[FARWELL J. The real importance is whether, as in Luxmoore J.'s view, the effect of the order is to debar you from a remedy to which you are entitled in bankruptcy.]

No injustice will be worked on anybody by the amendment I ask for. The parties will be left as they were unless we can induce the judge in bankruptcy to alter the valuation. The order appears to assume that the mortgagees have a right to consolidate the mortgages, which is very doubtful.

A. C. Edgar for the trustee in bankruptcy. I admit that your Lordship has a discretion in this matter: it is purely a question of what your Lordship thinks just. The question is whether a mortgagee who eleven months ago started proceedings and at his own risk made a valuation of his security should now be entitled to come to your Lordship and say: "I made a mistake. I was negligent in not getting a proper valuation made. Please let me undo all I have done and start afresh." He had three months in which he could have put the matter right, but he went ahead, and now he comes to your Lordship and says: "I, who made the mistake, can now say that it is just and equitable that I should appeal against my own order and upset the rights of the other parties." I submit that the plaintiffs have made their own bed and must lie on it.

Henry Johnston for the second mortgagees adopted Mr. Edgar's arguments.

FARWELL J. [after stating the facts, continued:] I am in no way concerned with any question whether this is a case in which the plaintiffs ought to be permitted to amend their proof in bankruptcy. That is wholly a matter for the judge in bankruptcy, and the evidence which has been filed, which is really directed to show, on the one hand, that it is a proper case for such leave to be given, and, on the other hand, that it is not, is irrelevant, and in no way affects any question that I have to determine, and in fact I doubt whether for the purpose of this application I am entitled to look at it. If the matter comes before the learned judge in bankruptcy again, he no doubt will consider the rights of third parties and other matters of that sort which will be before him: it is no question for me, and I am not concerned with it.

The first matter which I must consider is whether I ought to entertain the application at all. That this Court has power to discharge an order made in Chambers cannot be doubted, and is in fact expressly re-enacted in s. 62 of the Judicature Act, 1925. No express provision is made in the Rules for the time within which such an application can be made, but by analogy to the Rules governing time for appeals to the Court of Appeal, the application should be made within fourteen days after the making of the order. The Court, however, has power to extend the time. That being so, is this a case where I ought to discharge this order, having regard to the very long period of time that has elapsed since the order was made. It was an order made in the presence of the plaintiffs and the defendant, the trustee in bankruptcy, and no objection was taken to the form of the order by any one; it is a form of order that was settled many years ago, and has been frequently followed since. It is therefore a matter of some doubt whether such an order ought to be amended at all, and certainly whether such an order ought to be amended on an application made so late as this application is. On the other hand, there is no doubt whatever that I have a discretion as to whether I should entertain the application or not, notwithstanding that it is out of time, and in my view, if I am satisfied that the order is wrong, and may have results which it ought not to have, I ought to accede to the application.

The effect of the order, according to the view taken by the learned judge in bankruptcy, is to deprive the plaintiffs of the right of applying in the Bankruptcy Court to amend their proof, which is a right given to them by the Bankruptcy Act. That the order should be made in a form which has that effect seems to me to be in itself a justification for discharging the order, and making an order which will not deprive the plaintiffs of a right which they undoubtedly have. Moreover the order in its present form does an injustice to the trustee in bankruptcy, because it appears to have been made on the footing that there was a right to consolidate the mortgages, and therefore if the trustee in bankruptcy desired to redeem one mortgage he must redeem them all, whereas, in truth and in fact, there being no power to consolidate, the trustee in bankruptcy is entitled to an order in a form which will enable him to redeem one or more of the mortgages without redeeming them all.

In those circumstances I have come to the conclusion that it will be right to discharge this order, and to make another order in what I conceive to be the right form. I cannot see that by so doing I shall prejudice in any way the trustee in bankruptcy, because I shall make the order in such a form as will preserve to him the rights which he gets by virtue of his position under the Bankruptcy Act. It may be that, if the Bankruptcy Court thinks right to allow the plaintiffs to amend their proof, the figure at which the trustee start afresh." He had three months in which he could have put the matter right, but he went ahead, and now he comes to your Lordship and says: "I, who made the mistake, can now say that it is just and equitable that I should appeal against my own order and upset the rights of the other parties." I submit that the plaintiffs have made their own bed and must lie on it.

Henry Johnston for the second mortgagees adopted Mr. Edgar's arguments.

FARWELL J. [after stating the facts, continued:] I am in no way concerned with any question whether this is a case in which the plaintiffs ought to be permitted to amend their proof in bankruptcy. That is wholly a matter for the judge in bankruptcy, and the evidence which has been filed, which is really directed to show, on the one hand, that it is a proper case for such leave to be given, and, on the other hand, that it is not, is irrelevant, and in no way affects any question that I have to determine, and in fact I doubt whether for the purpose of this application I am entitled to look at it. If the matter comes before the learned judge in bankruptcy again, he no doubt will consider the rights of third parties and other matters of that sort which will be before him: it is no question for me, and I am not concerned with it.

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In those circumstances I have come to the conclusion that it will be right to discharge this order, and to make another order in what I conceive to be the right form. I cannot see that by so doing I shall prejudice in any way the trustee in bankruptcy, because I shall make the order in such a form as will preserve to him the rights which he gets by virtue of his position under the Bankruptcy Act. It may be that, if the Bankruptcy Court thinks right to allow the plaintiffs to amend their proof, the figure at which the trustee right to exercise all his remedies in respect of the infringement of his copyright, and s. 7 gives him the right to sue for conversion, including damages for copies sold. The two remedies are not alternative. *Birn Bros., Ld.* v. *Keene & Co.* (1) is the nearest approach to the present case, and there the two remedies were recognized. In *Muddock* v. *Blackwood* (2) the right of a plaintiff to proceed under both of the corresponding sections of the Copyright Act, 1842, was also recognized. The same reasoning applies here.

Hon. S. O. Henn Collins K.C. and *E. J. Macgillivray* for defendants. It cannot be suggested that the Act of 1911 does not provide two remedies, but the same set of acts do not give rise to two alternative remedies. If the plaintiff receives full satisfaction under s. 6 in respect of infringement he cannot say that under s. 7 he can begin all over again in respect of conversion: *Cooper* v. *Chitty*. (3)

FARWELL J. This action comes before the Court in a somewhat unusual manner. The plaintiffs are the owners of the copyright of a book known as "Heating and Ventilating." The defendant company have published a book known as "Modern Practical Plumber, Vol. III.," and caused to be printed and sold numerous copies of it. The plaintiffs allege that the defendants have infringed the copyright of their book "Heating and Ventilating" by reproducing in the defendants' book a substantial portion of the plaintiffs' book, and, under those circumstances, they claim in the action. [His Lordship stated the claim, and continued:] The defendants admit the title of the plaintiffs and they admit the infringement. They admit the acts complained of were done without the consent of the plaintiffs, and they rely upon s. 10 of the Copyright Act, 1911, and the Statute of Limitations as being an answer to some part, at any rate, of the plaintiffs' claim. "The defendants offer to submit to judgment for an injunction as claimed and to an inquiry as to what parts of the plaintiffs' said book have been reproduced in the defendants' said book and as to what damages the plaintiffs have suffered by the infringement by the defendants of the copyright in their said book which are recoverable in this action or alternatively as to what damages the plaintiffs have suffered by the conversion of infringing copies of parts of their said book which are recoverable in this action. The defendants offer to extract from each and every copy of their said book now in their possession or control all such parts as shall be found to have been reproduced from the plaintiffs' said book" ; and they offer to pay the costs.

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(1) [1918] 2 Ch. 281.
(2) [1898] 1 Ch. 58.
(3) (1756) 1 Burr. 20, 31.

On those pleadings it would have been open to the plaintiffs to set the action down on a motion for judgment as a short cause, but that would have been an inconvenient course to have adopted, because there is a serious question in this case as to the exact remedy which, on the admissions in the defence, the plaintiffs are entitled to, and the procedure by motion for judgment is not a convenient way of having a question of this sort determined. Accordingly, the action has been set down in the non-witness list to come on on this point of law. It is a somewhat unusual proceeding, but one which I think on the whole is a convenient method of disposing of the matter.

There are two questions I am asked to decide : firstly, in an action of this kind are the plaintiffs entitled both to damages for infringement and to damages for conversion ? and secondly, if they are so entitled does the limit of time of three years which is provided by s. 10 of the Copyright Act, 1911, apply in a case of an action for conversion ? The answer to these questions must turn on the true construction of ss. 6, 7 and 10. The whole foundation of any action of this kind, an action for infringement of copyright, is provided by the Act, and therefore, to see exactly what are the rights of a plaintiff and to what remedies he is entitled, it is necessary to look at the Act. The sidenote to ss. 6 to 10 inclusive is: "Civil Remedies for infringement of copyright." Sect. 6, sub-s. 1, provides : "Where copyright in any work has been infringed, the owner of the copyright shall, except as otherwise provided by this Act, be entitled to all such remedies by way of injunction or interdict, damages, accounts, and otherwise, as are or may be conferred by law for the infringement of a right." Then there is a provision with regard to the costs of the proceedings being in the discretion of the judge. Sub-s. 3 provides: "In any action for infringement of copyright in any work, the work shall be presumed to be a work in which copyright subsists and the plaintiff shall be presumed to be the owner of the copyright, unless the defendant puts in issue the existence of the copyright. . . . ." Then s. 7 provides: "All infringing copies of any work in which copyright subsists, or of any substantial part thereof, and all plates used or intended to be used for the production of such infringing copies, shall be deemed to be the property of the owner of the copyright, who accordingly may take proceedings for the recovery of the possession thereof or in respect of the conversion thereof." Sect. 10 provides: "An action in respect of infringement of copyright shall not be commenced after the expiration of three years next after the infringement."

Dealing with the first question, is a successful plaintiff in an action of this kind entitled to recover from the defendants damages for infringement and damages for conversion? If he brings an action for infringement and succeeds, he is undoubtedly entitled to an account of profits or damages; he is not entitled to both, but he is entitled to whichever he elects to take; he may also be entitled to an injunction, but it is said that in addition to those remedies he is also entitled, not as an alternative but as an additional remedy, to damages for conversion. Giving the best consideration I can to these sections, I have come to the conclusion that the plaintiffs have no right to recover both damages for infringement and damages for conversion in respect of the same cause of complaint. I may say at once that in my view there is no authority directly in point in this case. I have been quite properly referred to a decision of Peterson J. in *Birn Bros., Ld.* v. *Keene & Co.* (1), but that decision seems to me to turn wholly upon the particular form of judgment in that case. I think

(1) [1918] 2 Ch. 281.

the learned judge was careful not to commit himself at all as to the question which I have to determine, and, therefore, that case does not assist me.

I think that it is useful, in considering this matter, to see what is the nature of an action for conversion, and I find that stated for me by Lord Mansfield in *Cooper* v. *Chitty* (1). "The general question is, 'Whether or no the action is maintainable by the assignees, against the defendants, the sheriffs, who have taken and sold the goods?' It is an action of trover. The bare defining the nature of this kind of action, and the grounds upon which a plaintiff is entitled to recover in it, will go a great way towards the understanding, and consequently towards the solution of the question in this particular case. In form it is a fiction: in substance a remedy to recover the value of personal chattels wrongfully converted by another to his own use. The form supposes the defendant may have come lawfully by the possession of the goods. This action lies, and has been brought in many cases where, in truth, the defendant has got the possession lawfully. Where the defendant takes them wrongfully, and by trespass, the plaintiff, if he thinks fit to bring this action, waives the trespass, and admits the possession to have been lawfully gotten." As I understand what Lord Mansfield is saying there is this, that the basis of an action for conversion may be a fiction in this sense, that although the defendant may have wrongfully come into possession of the plaintiff's property the plaintiff proceeds in the action on the footing that the dealing with his property by the defendant is a dealing by the defendant as his, the plaintiff's, agent, and that he is entitled to recover from the defendant as his agent the proceeds of sale or other consideration obtained for the goods. If that be the true view as to the remedy by way of damages for conversion, it is obvious that the whole basis of the claim against the defendants under s. 7 of the Act is, in its nature, totally different from that which is provided by s. 6. The remedy given by s. 6 is a remedy given on the footing that the defendant has throughout

(1) 1 Burr. 20, 31.

been acting unlawfully and doing something which he was not entitled to do at all and gives a remedy to the plaintiff by way of damages or an account, not on the footing that the defendant was an agent or anything of that kind, but on the footing that the defendant has wrongfully trespassed upon his property and that, in consequence of that trespass and the wrongful dealing, the plaintiff is entitled to his remedy by way of damages or an account. On the other hand, when the Act provides that the plaintiff may sue for damages for conversion it is giving a remedy of a different kind altogether: the Act is providing that the plaintiff may say to a person who has converted his property: "This is my property and you are bound to account to me on the footing that you have disposed of it as my agent." If that be so, it seems to me impossible to come to the conclusion that those two remedies are open to the plaintiffs at one and the same time. By that I do not mean to say that it may not be open to a plaintiff to claim alternatively either for damages for infringement or damages for conversion: he may be entitled to do that in the same action, but he cannot recover both. In my judgment, he must elect which he will take, and if he chooses to take an account of damages for infringement he cannot at the same time have damages for conversion. The Act is giving to the plaintiff different forms of remedy in ss. 6 and 7; they are not concurrent but alternative remedies: he is entitled to elect which remedy he will take, but he cannot take both. In saying that, it must not be supposed that I am deciding that a successful plaintiff in an infringement action who has obtained damages for infringement in that action may not subsequently be entitled to bring another action for damages for conversion for some subsequent wrongful act of the defendant. If for instance the defendant in the first action fails to deliver up all the copies of the infringing work and subsequently sells them, in such a case it may be the plaintiff is entitled to damages for conversion for the further injury done to him; but in my judgment in an action for infringement the plaintiff cannot recover both damages for that wrong and for conversion.

I think this is a difficult question; it is not one with regard to which I can find any direct assistance from authority: but, giving the best consideration I can to the sections themselves and the interesting arguments which have been addressed to me, I have come to the conclusion that the answer to the first question asked is that these remedies are not concurrent, but alternative.

If that be so, the question as to s. 10 of the Act does not arise, because I understand that if the plaintiff is not entitled both to damages for infringement and for conversion he does not ask for the latter, and I do not propose to decide it. I will make a declaration that the plaintiffs are not entitled in this action to recover damages both for infringement and for conversion.

P. J. B.

C. A.

The plaintiffs appealed. The appeal was heard on January 13 and 14, and judgment was given on February 7, 1936.

K. E. Shelley for the appellants. The remedies afforded by ss. 6 and 7 of the Copyright Act, 1911, are not, as Farwell J. held, alternative remedies, but in an appropriate case both remedies are available.

Sect. 6 deals with a case where the copyright of any work has been infringed and gives damages for the injury to that right, which must be measured by the amount by which that right has been rendered less marketable. That is the measure of damages to this intangible right. It is to be noted that in that section no provision is made for delivery up of infringements, and that is because it is provided for in s. 7. That section visualizes a condition of affairs where the infringer has infringing copies in existence, and it provides that the infringing copies are to be deemed the property of the copyright owner, who may accordingly take proceedings for the recovery of the possession thereof or in respect of the conversion thereof.

[ROMER L.J. Do not the reliefs in s. 6 and s. 7 overlap?

The plaintiffs are asking for damages for infringement and at the same time claiming damages on the footing that the infringing copies are their property.]

The first head of relief is in respect of the intangible right called copyright, while the second head of relief is in respect of the sale of property which is made the property of the copyright owner by s. 7. There is therefore no overlapping.

[ROMER L.J. By claiming damages for conversion on the footing that what the defendants have sold is the plaintiffs' property, the plaintiffs have affirmed the defendants' act. How then can damages be given for infringement also ?]

The two matters are not interrelated. Thus there might be infringement without infringing copies, and s. 7 only applies as an additional remedy where there are infringing copies.

[GREENE L.J. Is there anything in the Act to prevent s. 7 from applying where infringing books are in the possession of booksellers ?]

Nothing, and in such a case damages for infringement of copyright under s. 6 could be recovered against the publishers. The view that both remedies are available concurrently receives support from *Austin* v. *Columbia Graphophone Co.* (1) The mere act of printing an infringing book is an infringement of copyright under s. 1 (*g*) of the Act of 1911 and gives a right to damages under s. 6 although no copy of the book has been sold. In *Muddock* v. *Blackwood* (2) damages for conversion were granted although an action could also be brought for infringement. That was decided under ss. 15 and 23 of the Copyright Act, 1842, which are in the main to the same effect as ss. 6 and 7 of the 1911 Act. *Birn Brothers, Ld.* v. *Keene & Co.* (3) throws no light on the present case. Damages for infringement only had been claimed, and Peterson J. held on that ground that damages for conversion could not be recovered. Farwell J. relied on *Cooper* v. *Chitty* (4), where Lord Mansfield explained that an action for conversion was based on a fiction. That was so at common law, but it has nothing to do with this case.

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(1) (1917–23) Macgillivray's Copyright Cases 398.

(2) [1898] 1 Ch. 58.

(3) [1918] 2 Ch. 281.

(4) 1 Burr. 20, 31.

[LORD WRIGHT M.R. The fiction was abolished by the Common Law Procedure Act, 1852, s. 49.]

Farwell J. was mistaken in linking copyright with infringing copies and the rights conferred by ss. 6 and 7 can be exercised at the same time.

E. J. Macgillivray (*Hon. S. O. Henn Collins K.C.* with him) for the respondents. Farwell J. was correct in holding that the rights conferred by the two sections are alternative. Sects. 6 to 10 of the Act form a group headed " civil remedies " and they all give remedies for infringement. The only infringement in this case was the making of the infringing copies. Their sale would not be an infringement if made innocently: see s. 1, sub-s. 2. When copyright is infringed by making and selling infringing copies, the remedies open to the copyright owner are (1.) damages for infringement; (2.) damages for conversion of infringing copies or for money had and received; and (3.) an account of profits. If a plaintiff elects to sue for damages for conversion under s. 7, it is on the footing that the infringing copies belonged to him and were made on his behalf, and he therefore condones the infringement by adopting the infringer's act in making and selling copies as his own. The measure of damages on a claim for conversion is the value of the copies sold, and not, as it would be on a claim for money had and received, the sum received on the sales. There is nothing in ss. 6 to 10 to cause a departure from the general principle that a plaintiff having more remedies than one cannot pursue inconsistent remedies. Thus he cannot approbate and reprobate and therefore cannot at the same time obtain damages for making infringing copies and damages for conversion on the footing that the copies were made for him. A similar contention was considered in *Neilson* v. *Betts* (1), and it was held that the plaintiff could not at the same time claim damages and an account of profits. That decision was followed in *De Vitre*

(1) (1871) L. R. 5 H. L. 1.

v. *Betts* (1) on the ground that a plaintiff could not pursue inconsistent remedies.

[LORD WRIGHT M.R. The question here is whether the two remedies given by ss. 6 and 7 are inconsistent.]

Sect. 7 gives a special statutory remedy which involves a hypothesis which prevents recovery under s. 6 as well. The sections are not, as has been contended, dealing with different causes of action but with different remedies for the same cause of action.

[GREENE L.J. Sect. 7 provides that infringing articles sold are to be deemed to belong to the owner of the copyright and does not leave the matter to his election.]

The section only gives a right to a particular remedy which need not be pursued. Originally it was only by bringing an action for trover that damages for conversion could be claimed, and that was only made possible by a waiver of the claim for trespass. The remedies under ss. 18 and 23 of the Copyright Act, 1842, were alternative, and the Copyright Act, 1911, has not altered the position.

[He also referred to *Burroughes* v. *Bayne* (2); *Chappell & Co.* v. *Columbia Graphophone Co.* (3); *Verschures Creameries, Ld.* v. *Hull and Netherlands Steamship Co.* (4)]

[GREENE L.J. referred to Seton on Judgments and Orders, 7th ed., vol. i., p. 664, citing *Muddock* v. *Blackwood.* (5)]

Shelley in reply referred to *British Westinghouse Electric and Manufacturing Co.* v. *Electrical Co.* (6); *Vavasseur* v. *Krupp.* (7)

Cur. adv. vult.

1936. Feb. 7. The following judgments were read:—

LORD WRIGHT M.R. This is an appeal from an order or declaration made by Farwell J. on a question of law raised on the defence.

The plaintiffs and the defendants are publishers. The

(1) (1873) L. R. 6 H. L. 319, 325.
(2) (1860) 5 H. & N. 296.
(3) [1914] 2 Ch. 745.
(4) [1921] 2 K. B. 608.
(5) [1898] 1 Ch. 58.
(6) (1911) 28 Rep. Pat. Cas. 517, 531.
(7) (1878) 9 Ch. D. 351.

plaintiffs, as owners of copyright in a work entitled "Heating and Ventilating," brought the action against the defendants, who published a work dealing in part with the same subject. The plaintiffs alleged that the defendants infringed their copyright by taking from their work a substantial part and including it in a book published by the defendants of which the defendants have printed and sold numerous copies.

The plaintiffs claimed an injunction and also an inquiry as to damages; they also claimed delivery up of all infringing copies and material. The relevant claim for this purpose is item 2: "An inquiry as to damages suffered by the plaintiffs by reason of the defendants' infringements and conversion by their publication of a book entitled 'Modern Practical Plumber, Vol. III.,' and payment of the amount found due."

The defendants, in their defence, admitted that they had infringed the plaintiffs' copyright and offered to submit to judgment in the terms set out in para. 5 of the defence.

The defence thus raised the point of law which was submitted to the Court, conveniently if perhaps informally. They contended that the remedies given by s. 6 of the Copyright Act, 1911, were alternative to those given by s. 7, and that the plaintiffs had an option to recover under the former section damages for breach of copyright, or under the latter section damages for conversion, but could not recover cumulatively under both sections.

Sects. 6 and 7 are in the following terms. [His Lordship read the sections.]

At first sight it might appear on reading these two sections that they severally give both cumulative rights and cumulative remedies, s. 6 dealing with the remedies, legal and equitable, appropriate to the infringement of the incorporeal right of copyright defined by s. 1, sub-s. 2, of the Act, and s. 7 giving a special and distinct right to claim in detinue or for damages in conversion in respect of the infringing copies which are by the section deemed to be the property of the owner of the copyright. Farwell J. has, however, come to the contrary conclusion, and has declared that the plaintiffs have no right in this action to recover both damages for infringement of copyright and damages for conversion. Hence this appeal.

The learned judge has come to this conclusion on the footing that in an action for conversion of goods the plaintiff is claiming from the defendant on the footing (to quote his words) "that the dealing with his property by the defendant is a dealing by the defendant as his, the plaintiff's, agent, and that he is entitled to recover from the defendant, as his agent, the proceeds of sale or other consideration obtained for the goods." The learned judge thereupon concludes that the remedy under s. 6 which is given for the wrongful act of trespass to the plaintiffs' copyright is inconsistent with the remedy under s. 7, which, in the judge's opinion, is based on the footing that the defendant was acting as the plaintiffs' agent. Hence, in his judgment, the two remedies cannot be pursued together, but the plaintiff must elect at least before judgment.

I find myself unable, with all respect, to concur in this conclusion. I leave aside for the moment the fact that s. 7 is not limited to conversion but includes detinue, and is not limited to claims against the infringer of the copyright. Thus an innocent bookseller may be sued under that section. But to deal only with conversion, it is perfectly true that when goods are converted the plaintiff may have a right instead of suing in conversion to waive the tort and sue as for money had and received—see, for instance, *Marsh* v. *Keating* (1) and *Brewer* v. *Sparrow* (2). If he does so he cannot also treat the act as wrongful and the measure of the claim is different. In conversion, the damages are the value of the goods at the time of conversion, whereas the claim for money had and received is for the actual proceeds, which may be more or less than the value. But in the present action the claim under s. 7 is limited under that section to conversion—that is, it is a claim for a tort. Perhaps some confusion may have arisen from the fact that the action in trover or conversion originally involved a fiction that the goods converted had lawfully come into the possession of the defendant before

(1) (1834) 1 Bing. (N. C.) 198. (2) (1827) 7 B. & C. 310.

he converted them. That fiction, like others, was devised by the common law to avoid a technical difficulty. Apart from such a fiction, the proper form of action would have been in detinue, which involved the inconvenience to the plaintiff that in detinue the defendant was entitled to wage his law: see per Martin B. in *Burroughes* v. *Bayne*. (1) The fiction was that the defendant had found goods which the plaintiff had never lost and the defendant had never found. But the Courts early treated these allegations as fictitious and prohibited the defendant from traversing either. It was in this sense that Lord Mansfield in *Cooper* v. *Chitty* (2) said of trover or conversion: "In form it is a fiction: in substance a remedy to recover the value of personal chattels wrongfully converted by another to his own use. The form supposes the defendant may have come lawfully by the possession of the goods. This action lies, and has been brought in many cases where, in truth, the defendant has got the possession lawfully. Where the defendant takes them wrongfully, and by trespass, the plaintiff, if he thinks fit to bring this action, waives the trespass, and admits the possession to have been lawfully gotten. Hence, if the defendant delivers the thing upon demand, no damages can be recovered in this action, for having taken it. This is an action of tort: and the whole tort consists in the wrongful conversion."

This passage makes it clear that conversion was essentially a tort. That was never waived. What might be waived was the trespass involved in wrongfully taking the goods. In fact that trespass had in many cases been committed as well as the subsequent conversion.

I may also observe that the fiction itself was abolished by the Common Law Procedure Act, 1852, s. 49.

The Copyright Act, 1911, must be considered with reference to the relevant law relating to conversion as at the date of the Act, and hence the fiction on any view could not now be regarded for any purpose, and furthermore the forms of action were abolished by the Judicature Act, 1873. Accordingly, I must reject the idea that there is the inconsistency

(1) 5 H. & N. 296, 301.

(2) 1 Burr. 20, 31.

which the learned judge finds between the remedies under s. 6 and s. 7.

No doubt in certain circumstances under these sections a plaintiff may be compelled to elect between different remedies. Thus, under s. 6 he may not claim both damages and an account of profits. These, from their very nature, are true alternatives. As Lord Westbury pointed out in *Neilson* v. *Betts* (1): "The two things are hardly reconcilable, for if you take an account of profits you condone the infringement." But, though this is so in its limited application, as I have sought to explain, there is no such irreconcilability between a claim for damages for infringement and a claim for conversion of infringing copies. Both are claims for a wrong, each wrong being different from the other. The former is for a wrong done to an incorporeal right, copyright, the latter is for conversion of particular chattels, the infringing copies. The measure of damages is different. In the latter case the measure is the value of the copies, which by force of the statute are deemed to be the property of the plaintiff, from the mere fact of being brought into existence; whereas in the other case the measure of damages is the depreciation caused by the infringement to the value of the copyright as a chose in action.

It was strenuously contended that where the infringement consisted in the multiplication and sale of copies of a work, the damages under the two sections would overlap and the injustice of giving double compensation would be committed. It may be true that in some cases there may be an overlapping of the damages under the two sections, but, as I have already explained, there are two separate and diverse causes of action, each of which must receive appropriate consideration when it comes to the question of damages. It is easy to give illustrations to show how necessary it may be in order to do justice to give compensation under each section. The value of a copyright may be seriously depreciated by the issue of a cheap and inferior infringement which vulgarizes the work. There is no reason in fairness why the plaintiff should not

(1) L. R. 5 H. L. 1, 22.

have full damages for this injury, and also have such further damages as the statute gives under s. 7. On the other hand, the infringer may have reproduced a very few copies of high intrinsic value, amounting to much more than the damage done to the copyright, which may be almost negligible. Each claim must receive its appropriate evaluation. It must be left to the good sense of the tribunal which assesses the damages to avoid giving excessive damages. Damages given under s. 6 may be in some cases modified by having regard to damages recoverable under s. 7, which would generally be fixed by the strict rule of awarding the value of the chattels converted. But in some cases there may be no interrelation at all, as, for instance, where a dramatic or musical work is infringed both by performance and by multiplying copies, or a picture by being exhibited and by being reproduced.

It may further be noted that claims under s. 7 may be brought in detinue or conversion against other parties than the infringer in addition, and perhaps subsequently, to and independently of claims against the infringer.

Apart from an order made by Astbury J. in *Austin* v. *Columbia Graphophone Co.* (1), there is little help to be obtained from the authorities in these Courts. The relevant passage in that report is as follows (2): " Some discussion followed as to the relief which ought to be granted to the plaintiff. Defendants' counsel conceded that on the judgment the plaintiff was entitled to an order for an injunction, delivery up of copies, and damages for infringement of copyright, but the plaintiff claimed that, in addition to damages for infringement of copyright, he was entitled to damages for conversion on the basis that the infringing records were infringing copies of the plaintiff's work, and therefore the property of the plaintiff, as provided by s. 7 of the Copyright Act, 1911. The learned judge held that the plaintiff was right, and gave him judgment accordingly with costs." But in *Birn Brothers, Ld.* v. *Keene & Co.* (3), where the sole question was whether the order for the inquiry into damages covered damages under both s. 6 and s. 7, Peterson J., in deciding that the order was on its true construction limited to s. 6, clearly distinguished between the two heads. "The damages to be assessed," he said, "are not the damages occasioned by the sale of copies, but damages occasioned by reason of the defendants having infringed the copyright by selling copies." He had no occasion to say precisely whether the two heads of damages were cumulative or alternative, but the reasons justifying the former view are very clearly set out in the argument of the late Lord Tomlin (then Mr. Tomlin K.C.). (1)

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(1) Macgillivray's Copyright Cases (1917–23) 398.

(2) Ibid. 421.

(3) [1918] 2 Ch. 281, 285.

It is true that under s. 7 the remedies in detinue and in conversion may be alternative, and a remedy in detinue will be inconsistent with and excluded by an order for delivery up of the infringing copies, which is an equitable remedy ancillary to the grant of an injunction and is limited to delivery up for destruction, whereas an order in detinue gives possession of the copies to the copyright owner in virtue of his statutory property in them. But in either case the effect is the same. The remedy is by a different legal method devised to prevent a stranger from acquiring, taking or selling infringing copies, which is a wrong additional to the infringement of the copyright.

The plaintiffs in the present action have distinguished their claim for conversion, which is in respect of copies sold, from the claim they have made for delivery up of copies in the defendants' possession.

The further point of law raised in the defence under s. 10 of the Copyright Act, 1911, which deals with limitation, has not been discussed and I express no opinion on it.

In the result, the appeal will be allowed, the order of the judge set aside, and in lieu thereof it will be declared that the plaintiffs have the right to recover in this action both damages for infringement of copyright and damages for conversion.

Romer L.J. The plaintiffs in this case are the owners of the copyright in a literary work. The defendants have

(1) [1918] 2 Ch. 283.

admittedly infringed that copyright by printing and publishing a book that reproduces a part of the plaintiffs' work, and have sold or otherwise disposed of a number of copies of such book. The plaintiffs are consequently entitled to the remedies given them by s. 6 of the Copyright Act, 1911, which remedies include the right to recover damages sustained by them by reason of such infringement. But by virtue of s. 7 of the Act yet another consequence results from infringement of copyright. The section is in these terms: [His Lordship read the section.]

The question that arises upon this appeal is whether the plaintiffs are entitled to recover damages for the conversion by the defendants of the infringing copies disposed of by them in addition to the damages occasioned by the infringement of their copyright.

This question was decided by Farwell J. adversely to the plaintiffs. He held that the remedies given by s. 6 and s. 7 respectively are alternative remedies and that a plaintiff cannot avail himself of both. His reason for so holding was that if a plaintiff asks for damages for conversion under s. 7 he must be taken to have waived the tortious infringement of copyright. The learned judge did not, of course, mean that by asking for damages for conversion a plaintiff waived all his rights under s. 6. Obviously, a plaintiff can obtain at one and the same time an injunction under s. 6 and damages for conversion under s. 7. So, too, in the case of a dramatic work, copyright in which may have been infringed both by a performance of the work in public and by printing and selling copies of the work, I cannot doubt that the owner of the copyright could obtain damages under s. 6 for the first of these two acts of infringement, and also damages under s. 7 for the conversion of the copies. But what I understand the learned judge to deny is that the owner of the copyright, in such a case, can obtain damages for the second of the two acts of infringement and damages for the conversion of the copies. He considers, as I read his judgment, that by asking for damages for conversion the owner of the copyright waives the infringement occasioned by the printing and selling of

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the copies, and that to this extent the remedies given by the two sections are alternative. With all respect to the learned judge, I am unable to concur in this view. Both sections occur in that part of the Act which is dealing with civil remedies for infringement of copyright, and I can find nothing in the words of the Act suggesting that the remedies were not intended to be cumulative. I have, indeed, already mentioned cases in which a plaintiff might desire to avail himself of both sections, and I can see no reason why he should not do so. Nor can I think that a plaintiff who seeks to avail himself of the remedies given by s. 7 waives in any way or to any extent the tortious infringement of his copyright. It is only infringing copies that are to be deemed to be the property of the owner of the copyright. If he waives the infringement, he must necessarily treat the copies as non-infringing, and in that case will not be deemed to have any property in them at all. As I read the Act, an infringer not only renders himself liable to the remedies given by s. 6, but also renders himself liable to have all infringing copies and all plates used, or intended to be used, for the production of such copies deemed to be the property of the owner of the copyright to the extent that the owner may take proceedings for the recovery of possession of them or damages for their conversion.

I may observe in passing that on this view of s. 7 it is arguable that any such proceedings are proceedings taken in respect of the infringement of copyright within the meaning of ss. 8 and 10. But as this point does not arise upon the present appeal it is unnecessary to consider it further. The only question for the moment is whether the remedies are alternative remedies, and, in my judgment, they are not.

But though the rights given by s. 6 are not alternative to those given by s. 7, it must, as it seems to me, often happen that where an owner of copyright obtains damages under the former section he can recover nothing further in respect of damages under the latter. If, for instance, the defendant in the action has sold 500 infringing copies of a literary work, the owner of the copyright may justly be considered to have been thereby deprived of the opportunity of selling 500 copies of his own work, and the damage so occasioned to him will form part of the damages he will recover under s. 6. But the damages that he has sustained will not be increased by deeming the infringing copies to be his property unless an infringing copy is worth more than one of his own. For by receiving damages under s. 6 he will already have been placed in the same position as he would have been in if the infringing copies were in fact his and were of the same value as the original copies. The loss of the opportunity of selling 500 of his own copies will not necessarily be the only damages occasioned to his copyright by the infringement. This, however, is immaterial for my present purpose, which is to show that unless the infringing copies are worth more than the genuine ones, s. 7 puts the owner of the copyright in no better position than he is placed by s. 6.

But these are matters to be considered by the tribunal which is called upon to assess the damages, and do not affect the decision to be given on this appeal, which, for the reasons given, should, in my opinion, be allowed.

GREENE L.J. I agree. There is, in my judgment, nothing in the language either of s. 6 or of s. 7, or of any other section of the Act, which suggests that the remedies conferred by ss. 6 and 7 are alternative and not cumulative.

Sect. 6 sets out the remedies for infringement—that is (see s. 2, sub-s. 1), the doing of an act the sole right to do which is conferred on the owner of the copyright by s. 1, or the doing of any of certain further acts specified in s. 2, sub-s. 2. In other words, the remedies specified in s. 6 are remedies in respect of the infringement of the incorporeal right vested in the owner of the copyright, a wrong which does not and could not in itself give rise to any remedy based on an actual or notional property in the infringing copies vested in the owner of the copyright. This latter remedy is conferred by s. 7, and the necessary foundation for it is laid by providing that the infringing copies "shall be deemed to be the property of the owner of the copyright." The remedies are different, the wrongs for which they are remedies are different, the subject-matters in respect of which the wrongs are committed are different. In these circumstances it would, in my judgment, have required clear language in the statute to make the two remedies alternative.

Speaking for myself, and with great respect for the judgment of the learned judge who thought otherwise, I do not think that there is any inconsistency in the attitude of a plaintiff who says at the same time that by making copies the defendants have infringed his copyright, and that the copies when made are to be treated as his property. Indeed, this appears to me as a matter of construction exactly what the two sections permit.

But in a case where damages are awarded in respect both of the infringement and of the conversion the tribunal which fixes the damages must be careful to see that no injustice is done. Damages under the two heads may or may not overlap in whole or in part. In so far as they do overlap that circumstance must, in my judgment, be taken into account. As an example of what I mean by overlapping let me take the following case. The owner of a copyright in a book proves that, whereas if it had not been for the infringement he could have sold 1000 copies, he has only been able to sell 500, the infringer having printed and sold 500 copies. It is obvious that as the possible market for the book is limited to 1000 copies, if the damages for infringement under s. 6 are fixed on the basis that the copyright owner would have sold 1000 copies but for the infringement and at the same time the value of the 500 copies sold by the infringer is fixed for the purposes of s. 7 at the amount for which they were sold, the result will be that the copyright owner will have recovered damages on the footing that there was an available market for 1500 copies instead of the real market for 1000 copies only. If he had sold 1000 copies there would have been no market for the 500 copies made by the infringer, which would accordingly have had no value. Conversely, if the 500 copies sold by the infringer were worth what they were sold for this could only be so on the basis

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that the copyright owner was only going to sell 500. In such a case it appears to me that to award to the copyright owner damages for infringement based on his inability to sell 500 copies and at the same time to award him damages based on the sale price of the 500 copies sold by the infringer would not be permissible.

Appeal allowed.
Leave to appeal to House of Lords granted.

Solicitors for the appellants: *White & Leonard.*
Solicitors for the respondents: *Oswald Hickson, Collier & Co.*

W. I. C.

Applied. MARRIAGE *v.* EAST NORFOLK RIVERS CATCHMENT BOARD. [1949] 2 All E.R. 50.

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Nov. 15, 19, 20, 21, 22, 26, 27, 28, 29;
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Jan. 16, 17, 20, 22, 23, 24, 27, 29, 30, 31;
Feb. 10.

[1934. N. 171.]

Fishery—Several and exclusive Fishery—Pollution of stream—Action for Injunction and Damages—Invasion of a legal right—Proof of pecuniary loss not necessary.

The plaintiff was the owner of two several and exclusive fisheries in the River Ouse below Ely. The defendants carried on the business of beet sugar manufacturers at a factory abutting on the Ouse some miles above the plaintiff's fisheries. The plaintiff alleged that in the course of the defendants' manufacturing operations, and in particular from September, 1933, to January, 1934, following the beet harvest, large quantities of refuse and effluent were discharged from the factory into the river, and by reason of that he had suffered damage and his fisheries had been prejudicially affected. He claimed an injunction accordingly and damages. At the hearing evidence was also given as to injury to the fisheries between September, 1934, and January, 1935.

Clauson J. *held*, (1.) that the plaintiff had failed to establish that he had suffered any pecuniary damage and that that was the gist of the action; and (2.) that the plaintiff had failed to show that the injury to the fisheries was caused by the effluent from the defendants' factory.

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On appeal:—

Held (reversing Clauson J. on the first point), that disturbance of a several fishery is an invasion of a legal right, and in such a case it is not necessary to prove pecuniary loss, but the injury to the legal right carries with it the right to damages.

But *held* (affirming Clauson J. on the second point), that the plaintiff had failed to show that the injury to his fisheries had been caused by the acts of the defendants.

Fraser v. *Fear* (1912) 107 L. T. 423 explained and distinguished.

APPEAL from a decision of Clauson J. dismissing an action by the plaintiff, Charles Thurston Nicholls, against the defendants, the Ely Beet Sugar Factory, Ld., in respect of injury to his fisheries in the River Ouse.

The following statement showing the nature of the plaintiff's claim and the manner in which it was dealt with by Clauson J. is taken from the judgment of the Master of the Rolls.

The plaintiff, who is the appellant here, is the owner of a several fishery on the River Ouse at Littleport and Southery. The defendants are the owners and workers of a beet sugar factory about five miles above the beginning of the fishery, and the plaintiff claims damages for interference with and disturbance of his fishery; this the defendants deny. It is important to see exactly how the claim is put. It is put in this way in the statement of claim: "In the course of the defendants' manufacturing operations and particularly during the months of September, October, November and December, 1933, and January, 1934, following the beet harvest, large quantities of refuse and effluent were discharged from their said factory into the said river. Such discharge is in particular effected by the said refuse and effluent being conveyed into the said river by means of pipes from the factory premises. The defendants wrongfully discharged or permitted to be discharged from their said factory premises great quantities of refuse and effluent as aforesaid into the said River Ouse of such a foul, noxious and injurious nature that the same seriously polluted the water of the parts of the said river referred to in para. 1 hereof and thereby killed very many of the fish in the same, and otherwise seriously injured the

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plaintiff's fisheries." There were particulars given and the material particulars are "The discharge of refuse and/or effluent is alleged to have taken place throughout the period from September 22, 1933, to January 16, 1934, particularly each day throughout the months of September, October and November, 1933. . . . . The nature of the refuse and effluent alleged to have been discharged was noxious and injurious liquid and was discharged from five pipes leading from the factory premises directly into the river and consisted in what is known as conveying water, washing water, condenser water and process water." I may say at once in respect of that statement of claim that the material time at which the discharges are said to have taken place must be limited now to the end of September and a few days in October; at least, these are the only days on which the damage was found or alleged to have taken place; and secondly, that it is now admitted that the conveying water, the washing water and the process water were not discharged from the factory at those times.

This was the second action against the same defendants, claiming damage to the same fishery. The first was tried before Farwell J., who gave judgment in March, 1931, and was in respect of damage alleged in 1928 and 1929. He found for the plaintiff and awarded damages of 200*l.*, but he deferred granting an injunction for a certain period. Matters proceeded without any complaint during the years 1931 and 1932. After the learned judge's judgment, various alterations in the system had been made. In the judgment, it is important to notice, the plaintiff's title to the fishery was established, and has not been in any way in issue in these proceedings.

Then came this action, which relates to 1933, and in the course of the action evidence was given of similar matters of complaint in 1934. The action was dismissed by Clauson J., and the first ground on which he put his dismissal was on the ground of law—namely, that no pecuniary damage had been proved, whereas in fact damage was the gist of the action. What the learned judge said was this: "The questions that I have to determine are first of all, has he proved"—that is to say, has the plaintiff proved—"that there was damage to his fishery of such a nature as to be reasonably calculable in money? The damage, in my view—I will not pause to discuss the point—in actions of this character is the gist, and unless he proves damage he has no right of action. Secondly, assuming that damage has been occasioned to his fishery, does he prove that that damage was occasioned by something which was discharged or permitted to be discharged from the defendants' works by them into the river, being foul or other noxious or injurious matter or liquid." Then the learned judge proceeds: "First of all, was any damage occasioned at all? On the materials before me, I feel quite unable to assess in money any damage at all to the plaintiff having regard to all the circumstances to which I have alluded." Then he goes on to state the various grounds, for instance that the plaintiff himself does not fish; he sells tickets; and he holds that there has been very good sport in the plaintiff's fishery. Then he proceeds: "I cannot persuade myself that the plaintiff is a penny piece the worse, if I may put it in popular parlance, for the fact that a certain number of fish were killed, and there is certainly evidence that some were killed in his fishery, on any of the three occasions I have mentioned." Then he goes on to refer to an admission by the plaintiff's counsel "that if a money value has to be put on the actual damage done, it would be quite impossible at the highest to be more than some such sum as 5*l.* or 10*l.*, some sum which is perfectly trivial, of course, as compared to the expenses. On that finding it would be sufficient for me to say that the plaintiff has proved no damage, and on that ground I dismiss this action." Then the learned judge goes on to say that the plaintiff, on the issues, has not established his case.

The appellant appealed. The appeal was heard on November 15, 19, 20, 21, 22, 26, 27, 28, 29, 1935; January 16, 17, 20, 22, 23, 24, 27, 29, 30, 31; February 3, 4, 1936.

The only point calling for a report was whether it was essential to the plaintiff's case that he should prove that he had suffered pecuniary damage.

T. Eastham K.C. and *A. W. Elkin* for the appellant.

Fergus Morton K.C. and *C. Montgomery White* for the respondents.

Cur. adv. vult.

1936. Feb. 10. LORD WRIGHT M.R. stated the facts as above set out and continued: Before I deal with the case in detail, may I say at once that I have found it impossible to accept the same view as the learned judge on this question of law, and, as the matter may be of some importance I feel bound to state why I do not think it applies in a claim of this character. The plaintiff's right is as owner of a several fishery, which in this case is a fishery in gross, and not a fishery appendant or appurtenant to the ownership of the soil. The nature of his rights is that he has an incorporeal hereditament in the fishery, and he has also property in the fish that are found in the fishery.

I need only to refer to two cases in this connection. One is *Child* v. *Greenhill* (1): "Trespass for entering and breaking his close and fishing in separali piscariâ suâ, and for taking pisces suas ibid.—namely, 100 eels, etc. After verdict, upon not guilty pleaded, and found for the plaintiff, and damages entire given." The Court held that trespass lay. They say: "Wherefore being taken out of his several piscary, and not extra liberam piscariam suam, the action is maintainable"; the matter was actionable in trespass for breaking and entering his close and fishing. There the action was in trespass both to the close and to the actual fish that were taken, but in the case of an incorporeal hereditament, though the action may be in trespass to the fish actually taken out or destroyed by wrongful acts, there cannot be in the strict sense of the term a trespass to the incorporeal hereditament, but there may be an action in the nature of trespass.

That class of case is dealt with in *Fitzgerald* v. *Firbank* (2), where it was held "that the grant did not give a mere licence to fish, but a right to fish and to carry away the fish caught; that this was a profit a prendre, and was an incorporeal

(1) (1638) 4 Cro. Car. 553.

(2) [1897] 2 Ch. 96.

hereditament; and that the plaintiffs had a right of action against any one who wrongfully did any act by which the enjoyment of the rights given to them by the deed was prejudicially affected." Lindley L.J. says (1): "It was laid down in *Smith* v. *Kemp* (2) and is repeated in Comyn's Digest, 5th ed., vol. v., p. 362, 'Piscary': 'If a grant be de liberâ piscariâ, the grantee shall have the property of the fish there, and shall maintain trespass for fishing there'"—that was the same as the case last cited. "You cannot draw any distinction"—the Lord Justice proceeds—"with reference to the right of taking away the fish between one kind of right of fishing and another. If a person chooses to pay for the amusement of catching fish and leaving them in the water, of course he can do so." Then the Lord Justice goes on to find what the plaintiffs' rights are in the fishery and he adds: "The defendant has no right to foul the river to the damage of anybody who has rights in that river. He is a mere wrongdoer, though if the plaintiffs had no rights in the river of course they would have no right legally to complain. This is a somewhat unusual case, and I am not aware of any precedent for what I may describe as an action of nuisance by the owner of a sole and exclusive right of fishery. But once grant that the owner of such a right can sue in trespass for one kind of infringement of it, I cannot see why he might not maintain an action on the case for nuisance at common law for such an interference with his right as is proved in this case." That therefore defines the right, and it also defines the cause of action which follows from an infringement of that right. It is not, I think, material to decide whether the proper description of that cause of action is trespass, or trespass on the case or nuisance, forms of action which are now abolished. If it were described as "nuisance" the word "nuisance" would be used in that connection as meaning a private nuisance, one which involved an interference with a private right, so that, as I shall explain in a moment, an action would lie for that interference. Rigby L.J. at the end of his judgment says (3): "I hold

(1) [1897] 2 Ch. 101.

(2) (1692) 2 Salk. 637.

(3) [1897] 2 Ch. 96, 104.

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that the grantees of the incorporeal hereditament have a right of action against any person who disturbs them either by trespass or by nuisance, or in any other substantial manner," that is to say, any disturbance which the law recognizes as constituting a disturbance.

Now that being the state of things, you have here a form of action in which damage is not the gist of action. The matter is very clearly stated in a work, fortunately not a work of authority, but to which we are all as lawyers indebted, Sir Frederick Pollock's Law of Torts; I just want to read one very short passage on p. 391 of the 13th ed. The learned writer is referring to easements; he says this: "Nevertheless disturbance of easements and the like, as completely existing rights of use and enjoyment, is a wrong in the nature of trespass, and remediable by action without any allegation or proof of specific damage; the action was on the case under the old forms of pleading, since trespass was technically impossible, though the act of disturbance might happen to include a distinct trespass of some kind, for which trespass would lie at the plaintiff's option." The words apply exactly to the present case, and I accept them as part of my judgment.

Child v. *Greenhill* (1), which I have cited, is a case where there was trespass in the strict sense of the term, that is to say, direct interference with the physical property of the plaintiff. *Fitzgerald* v. *Firbank* (2) which I have also cited, is a case of trespass on the case or nuisance where the damage was to an incorporeal hereditament; both these are cases covered by what the learned writer has stated. *Harrop* v. *Hirst* (3), to which Sir Frederick refers, is an authority again for the proposition that if you have an infringement of a legal right there is a right of action without actual damage being proved. The claim was for diverting water, and it was held that an action for diverting water is maintainable without proof of any actual personal damage, inasmuch as the act of the defendant might, if repeated often enough without interruption, furnish evidence in derogation of the plaintiff's legal rights. Although that is a reason which is emphasized in that case, and for which there is good authority and good ground, the ability to maintain such an action without proof of actual loss depends on a much wider principle, that is, the principle that where you have an interference with a legal right the law presumes damage.

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(1) 4 Cro. Car. 553.
(2) [1897] 2 Ch. 96.
(3) (1868) L. R. 4 Ex. 43.

Perhaps it is almost unnecessary in these days to refer to such a case as *Ashby* v. *White.* (1) There the claim was brought by a plaintiff for an interference with his franchise or right to vote at the election of members of Parliament. He sued the returning officer for refusing to admit his vote, and it was held that, although he suffered no pecuniary loss, and indeed without his vote the person for whom he was seeking to vote (because the election was publicly held) was elected, still he had a cause of action. The jury found in his favour with substantial damages. It is true that the verdict was set aside by the Court of King's Bench, but it was restored by the House of Lords. Holt C.J., in the course of his judgment, which was eventually upheld in the House of Lords, said (2): "My brother Powell indeed thinks, that an action upon the case is not maintainable, because there is no hurt or damage to the plaintiff; but surely every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for *a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right,*" and then he gives an instance of slander which is only true with limitations, and he goes on to say: "So if a man gives another a cuff on the ear, though it cost him nothing, no not so much as a little diachylon, yet he shall have his action, for it is a personal injury. So a man shall have an action against another for riding over his ground, though it do him no damage: for it is an invasion of his property, and the other has no right to come there; and in these cases the action is brought vi et armis"; and then further illustrations are given.

It is unnecessary to multiply authorities. Perhaps the

(1) (1703) 1 Sm. L. C. 13th ed., 253.

(2) Ibid. 274.

most striking instance of an action of this character, where a right is infringed and the action is maintainable without proof of damage, is the case of breach of contract where, though no damage is proved as resulting from the breach, the defendant is not entitled to judgment, but the plaintiff is entitled to judgment for nominal damages; there are many other cases. The cases in which actions are not maintainable without proof of actual damage, that is to say, where damage is the gist of the action, and where the cause of action is not complete without proof of damage, fall into a different category. The most obvious and familiar is an action for negligence regarded as an independent tort; malicious prosecution is another; so also conspiracy to injure and deceit and, subject to certain exceptions, slander. In all these cases there is no actionable wrong unless damage has been caused to the plaintiff by what has been done or omitted. Thus, in the case of negligence, the plaintiff is not entitled to complain unless he is injured by the negligence; otherwise the negligence does not interest or concern him; the same is true of conspiracy; so of deceit; there is in those cases no interference with a right, no disturbance or invasion of a right of property or any other right; thus, e.g., the cause of action is not merely that the defendant was negligent, but he was negligent in such a way as to damage the plaintiff.

I must, however, pause to refer to an argument which was based upon *Fraser* v. *Fear* (1) and was very strongly pressed upon the Court by Mr. Morton. In that case there were considered the statutes, the Salmon and Freshwater Fisheries Acts, 1861 and 1873, and I shall refer to those Acts in their present form, because it was in that form that they were relied upon in this case—namely, the Salmon and Freshwater Fisheries Act, 1923, which is a consolidating Act. In *Fraser* v. *Fear* (1) the earlier Acts of 1861 and 1873 were relied upon; but the relevant provisions were the same in effect as are now to be found in the Act of 1923. Sect. 8, sub-s. 1, which was relied on, is in these terms: "No person shall cause or knowingly permit to flow, or put or knowingly

(1) 107 L. T. 423.

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permit to be put, into any waters containing fish, or into any tributaries thereof, any liquid or solid matter to such an extent as to cause the waters to be poisonous or injurious to fish or the spawning grounds, spawn or food of fish, and if any person contravenes this sub-section he shall be guilty of an offence against this Act." Then there is a proviso (*b*) which may be material: "Nothing in this sub-section shall prevent any person from acquiring a legal right in cases where he would have acquired it if this Act had not been passed, or exempt any person from any penalty to which he would otherwise be subject, or make lawful any act or default which would but for this Act be a nuisance or otherwise contrary to law." Then sub-s. 3 is: "Proceedings under this section shall not be instituted except by the fishery board or by a person who has first obtained a certificate from the Minister that he has a material interest in the waters alleged to be affected." This Act is to be enforced by proceedings for penalties. As I understand Mr. Morton's argument, it was that because a statutory offence had been created by this Act and the earlier Acts, and because any person injured by the committal of that statutory offence might or would have an action for the private injury to himself caused by the breach of the statute, the new rights given by the Act supersede the old right to claim damages at common law for the injury to the incorporeal hereditament enjoyed independently of the statute. It struck me at once as a very hard proposition to say that an Act like this which imposes penalties on grounds of public policy, in order to prevent certain things being done and which is for the benefit and protection of the owners of fisheries, should have the singular effect of depriving them of their common law remedies. I observe that Farwell J. in *Stevens* v. *Chown* (1) had held that even a plaintiff suing for injury to himself personally by breach of the statute would be entitled to claim an injunction. But Mr. Morton relied on *Fraser* v. *Fear* (2) in support of his proposition, which was this, that no longer is it true that a plaintiff claiming damages to an incorporeal

(1) [1901] 1 Ch. 894.

(2) 107 L. T. 423.

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hereditament—namely, a fishery—can claim without proof of actual damage; he argued that *Fraser* v. *Fear* (1) had decided that in such a case particular and substantial damage must be proved. I have examined *Fraser* v. *Fear* (1) with some care to see whether it bore out that proposition, which certainly struck me as startling, and I have come to the conclusion that it does not. The plaintiff there brought an action for various claims based on his common law rights and on injury at common law to those rights. He failed on all those matters. The only claim that was left for considera- was a specific claim based on the specific right said to be given to him by statute, and it was held in respect of that—I am not dealing with the various conflicts of opinion in the case—that he could only succeed if he established special damage to himself; that would obviously be so, because a particular individual can never claim in respect of a public nuisance unless he can show that he has suffered private and particular damage beyond the rest of the community by reason of an act in breach of the statute. That case goes no further than that, and leaves the common law absolutely unaffected, and I think the common law is as I have stated.

No doubt it must always be shown that there has been an actual interference with the plaintiff's rights. The maxim de minimis, which is always difficult to apply, would have to be considered here. There must be, in the words of Rigby L.J. in *Fitzgerald* v. *Firbank* (2), a substantial interference, but that does not affect in any way the view which I have stated—namely, that the trespass or interference with the right imports damage so long as it is something which the law can fix upon as being sufficiently substantial to constitute an interference. Where you have such a case the damages are at large; they are a matter for the jury; and if the Court of Appeal were giving judgment for damages in a case where the judge below had failed to award damages, then the Court of Appeal would have to award the damages just as a jury would do; they can, of course, refer the matter, but they are entitled to give damages.

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(1) 107 L. T. 423.

(2) [1897] 2 Ch. 96, 104.

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That being my view of the law, I must now consider the question whether the plaintiff has established the case he has made, whether Clauson J. was wrong in the decision that he arrived at that the plaintiff's case had not been established. [The Master of the Rolls then dealt in detail with the evidence and said that the result of it was that he found himself in agreement with the conclusion arrived at by Clauson J. and that he thought the appeal should be dismissed with costs. He continued :] Now I want to say just a word or two about another aspect of this case which I confess has caused me the greatest anxiety, not now, but as the case went on day after day. I began to wonder where it would end and when it would end, and whether there was any possible means of curtailing the proceedings on the one side and the other. In a case like this, the first thing that occurs to the mind is that the only matters involved are of very small importance in money or, indeed, in substance. The plaintiff has his fishery; his title is not attacked; in two years he has suffered for a very brief period an injury for which I think, not ungenerously, I have estimated, treating the damages as being at large, 50*l.* as the sum which I think a jury would fairly have given. There is no threat on the part of the defendants to repeat what they have done. The circumstances were such that if these transitory damages were inflicted in these two brief periods when the factory started working it was very improbable that the same thing would happen again. I have not considered the matter finally, but in my judgment it seems to me very improbable that under circumstances like these the Court would have granted an injunction against the defendants, even if the plaintiff had established his case. The issues, I daresay, are much more important from the point of view of the defendants, because an injunction, if it were granted, might have radically affected their whole method of working and might have entirely destroyed the chance of making a profitable use of their factory and their appliances; but from the point of view of the plaintiff the matter involved seemed to me almost nugatory. The trouble, however, is this, that when a case of this type comes before the Court, unless the Court is able to apply the doctrine that it is too small for the Court to take cognizance of it, the Court is bound to try it with the same care as would be required in a case in which questions of the greatest importance, either in value or in principle, or in regard to reputation are involved. Just as there is not one law for the rich and one for the poor, so there is not one law for cases which involve small amounts of money or issues of comparatively small importance and another law for those which do involve the major and graver issues. The result has been that in this case, which I have characterized in this way, fourteen days have been occupied before the judge, and I am told, more than eighty-three hours of the time of this Court. The effect of that upon the rest of the list is very serious. Other litigants who have cases, perhaps of greater importance—I hope they are of greater importance in the respects which I have indicated—have been compelled to wait. There is only one Court taking these cases, and cases cannot be hurried. The result is that the list has fallen behind. I must say this, that although each member of the public has a right to come to this Court and ask for justice according to law, no one is entitled to inflict upon the Court a case of this length and complexity, unless for very good reasons. The Court must rely on the good sense of the public not to inflict upon the Courts litigation which involves a waste of time to the Court and a serious hardship on the other side unless for good and sufficient reason. That is one thing I want to say. Of course, it is true that to some extent the person who acts in that way is penalized by having to pay the costs, and no doubt the costs in this case are a very heavy matter indeed, but that is only one aspect of the matter.

I want to say another thing. [His Lordship then referred to the manner in which the case had been overloaded with inconclusive material, which does not call for further notice, and concluded :] Anyhow, the final result is, so far as I am concerned, that the appeal is dismissed with costs.

ROMER L.J. The Master of the Rolls has dealt so fully with the law and the facts of this case that I do not find it necessary to add very much. I agree with him that if the plaintiff can show that his rights of fishery have been invaded he is entitled to succeed in this action without having to prove that he himself has suffered any financial loss. At the same time, I share the regrets that have been expressed by the Master of the Rolls, that so much time, so much money, so much ingenuity and so much learning should have been expended on a case which from a pecuniary point of view, whether one looks at the value of the fishery, or whether one regards the extent of the alleged invasion of the plaintiff's rights, is of comparatively small importance. My regret is increased by the fact that the greater part of that expenditure was, in my opinion, wholly unnecessary. [His Lordship then reviewed the evidence and agreed that the appeal failed and must be dismissed with costs.]

GREENE L.J. I am of the same opinion. [His Lordship dealt with the evidence and agreed in the dismissal of the appeal.]

Appeal dismissed.

Solicitors for the appellant: *Hutchinson, Sons & Gomm.*

Solicitors for respondents: *Morris, Ward-Jones, Kennett & Co.*

W. I. C.

ODHAMS PRESS, LIMITED *v.* LONDON AND PROVINCIAL SPORTING NEWS AGENCY (1929), LIMITED.

C. A.
1936
Feb. 6, 7.

[1934. O. 1101.]

Copyright—Horse-racing—Starting Prices—Transmission by Telephone of prices ascertained by plaintiffs' employees—Subsequent publication on racecourse—"Literary work"—Subject-matter of copyright—No Infringement proved—Declaratory Order—R. S. C., Order xxv., *r.* 5—*Copyright Act,* 1911 (1 *&* 2 *Geo.* 5, *c.* 46), *ss.* 1, *sub-s.* 2; 24, 31, 35.

The starting prices or final betting odds on horses engaged in horse-races were ascertained, agreed, and noted down at the start of each race by two journalists employed by the plaintiffs working together from information collected on the course from bookmakers and others, and after the result of the race were communicated to a representative of the Press, then to bookmakers, and then publicly announced on the course.

Eve J. held that the entries in the note-book of starting prices were not a literary compilation and therefore not the subject of copyright within the Copyright Act, 1911.

On appeal the plaintiffs abandoned their claim for damages for infringement of copyright, as they admitted that they were unable to point to any specific infringement, but obtained the leave of the Court to amend their notice of appeal by confining it to a claim for a declaration that they were joint owners of the copyright in the starting prices or betting odds recorded by their representatives:—

Held, by the Court of Appeal, without deciding whether the entries in question were a literary compilation and so the subject of copyright, that inasmuch as no specific document was named in which copyright was claimed and no evidence of any specific infringement had been given, the case was not one in which the Court would exercise its discretionary power under Order xxv., r. 5, by making the declaratory order asked for.

Appeal from the order of Eve J. [1935] Ch. 672 dismissed.

APPEAL from a decision of Eve J. (1)

The first-named plaintiffs as owners respectively of Sporting Life and Sporting Chronicle, claimed to be joint owners of the copyright in the starting prices or betting odds, at the fall of the flag, fixed by their representatives on the racecourse immediately after the start of any horse-race in

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(1) [1935] Ch. 672.

Great Britain or Ireland, and that it was an infringement of such alleged copyright for the defendants, the London and Provincial Sporting News Agency (1929), Ld., to record or reproduce them in any material form for the purposes of transmission and/or to transmit them by telephone or otherwise to their subscribers for reward or otherwise to communicate the starting prices systematically to other persons by way of trade. The plaintiffs further claimed damages for alleged infringement of copyright.

The defendants pleaded that the starting-price odds were ascertained by two journalists, one on the staff of the Sporting Life and the other on the staff of the Sporting Chronicle, that those journalists had access to the books of a leading bookmaker or bookmakers showing the odds actually given on bets taken at the fall of the flag, and that those starting prices were ascertained for the information of all concerned and given by the journalists to a representative of the Exchange Telegraph Company, Ld., and to bookmakers' runners, and, shortly after each race, were publicly posted on a board on the course. The defendants denied that copyright subsisted or could subsist in the said starting prices or any of them, or belonged to the two first-named plaintiffs, or that the other plaintiffs—namely, the Press Association, Ld., the Exchange Telegraph Company, Ld., and the Central News, Ld., or any of them—had any interest in the starting prices. The defendants further said that the starting prices were not original literary works within the Copyright Act, 1911, but constituted an item or items of news available for all concerned, and particularly for those interested in starting-price betting on horse-races. The defendants admitted that they carried on business as distributors of racing news from Blower House, Poland Street, and that they offered to give their subscribers the starting prices of the first three horses past the post.

Eve J. dismissed the action on the ground that the entries in the note-books of starting prices were not a literary compilation and therefore not the subject of copyright within the Copyright Act, 1911.

The material facts are fully stated in the judgment of Eve J. (1)

The plaintiffs appealed. The appeal was heard on February 6 and 7, 1936.

In the course of the argument counsel for the plaintiffs admitted that they could not produce any evidence of specific infringement and asked for and obtained the leave of the Court to amend their notice of appeal by confining it to a claim for "a declaration that the plaintiffs, Odhams Press, Ld., and Allied Newspapers, Ld., are joint owners of the copyright in the starting prices or betting odds at the fall of the flag as ascertained and compiled and recorded in writing by their respective representatives on the racecourse immediately after the start of any horse-race in Great Britain or Ireland."

Lionel Cohen K.C., H. D. Samuels K.C. and *E. J. Macgillivray* for the appellants.

Hon. S. O. Henn Collins K.C., J. P. Eddy and *L. R. Dunne* for the respondents.

LORD WRIGHT M.R. This action presents somewhat peculiar features, and comes before this Court on an appeal from Eve J., who has dismissed it, as he states his ground, in this way: I read what he says, because I can in a moment easily fill out the circumstances which go to explain what was said. He says: "The whole thing, in my opinion, depends on the question whether or not the entries in these books or the scrap of paper mentioned by Mr. Dawson constitute a series of literary works in the nature of tables or compilations, and it is on that allegation that they do that the plaintiffs rest their claim to the declaration asked for." The learned judge goes on to say: "In my opinion, it is impossible to say that these are literary works, in the nature of tables or compilations, made by these investigators." Then at the end he says: "I therefore hold that the expression 'literary work,' though it includes maps,

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(1) [1935] Ch. 672.

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charts, plans, tables and compilations, does not include the documents on which the plaintiffs rely." So that the learned judge there is proceeding on the assumption that he is dealing with certain specific documents, and he is saying that those particular documents are not literary works within the meaning of the Copyright Act, 1911. [The Master of the Rolls stated the facts, and continued :] The question has been raised before this Court by the defendants—apparently it was not raised before the learned judge—whether this is a proper case in which the Court should exercise its jurisdiction under Order XXV., r. 5. There was, as I have already said, in the writ and statement of claim a claim for damages for infringement of copyright; no evidence in support of that allegation was given before the learned judge, and Mr. Cohen has quite frankly and properly stated here that he cannot give any evidence of any specific infringement.

The claim for a declaration, as it has been amended and limited in the notice of appeal, is in these terms: "A declaration that the plaintiffs, Odhams Press, Ld., and Allied Newspapers, Ld., are joint owners of the copyright in the starting prices or betting odds at the fall of the flag as ascertained and compiled and recorded in writing by their respective representatives on the racecourse immediately after the start of any horse-race in Great Britain or Ireland." The second form of declaration which was asked for has been abandoned, and the claim for an inquiry as to damages has also been abandoned, so that as the matter comes before this Court it is limited to this declaration, which, as I have already said is in the most general terms.

The claim as now presented does not refer to any particular documents in which copyright is claimed. It is clear that if there is copyright in these books, it must be a copyright in each particular page of each particular book, as and when the entries are made; and it is equally clear that in respect of such books as have been produced to the Court, and which relate to races which have long since been run, there is very little prospect that anybody, least of all the defendants, will want to commit any infringement of the copyright (if there be copyright) in those particular works, if they are to be described as literary works.

So far, dealing with the existing documents, it would appear that on any view of the legal position there is very little practical object to be served by making any general declaration, because it is perfectly clear that there was, and could be, no evidence that they ever were infringed in the past, and their infringement in the future is something too improbable to be reasonably foreseen at this stage. On the other hand, it would be quite impossible, in my opinion, for the Court to make a general declaration as to the potential copyright in future documents of the same kind which may or may not come into existence in the future.

The position, therefore, is very unlike that in any of the other cases which I have been familiar with, where the Court has exercised its discretion under Order XXV., r. 5. The rule is in these terms: "No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not." The power of the Court, vested in it under this rule, is a discretionary power, and in every case the Court must exercise its discretion on the facts of the particular case; but that the Court has power to make a declaratory order in cases where no consequential relief can be given in the action is very well established; I may refer to *Guaranty Trust Co. of New York* v. *Hannay & Co.* (1), where a declaration was claimed by a New York bank that they did not, by presenting a bill of exchange for acceptance with a bill of lading attached to it, represent that the bill of lading was genuine, and that they were not bound to repay the amount of the bill when it turned out that the bill had been forged. There was some difference of opinion in the Court of Appeal. Buckley L.J. was against the propriety of making any such declaration, and on the other hand, Pickford L.J. and Bankes L.J. thought that the

(1) [1915] 2 K. B. 536.

circumstance that no consequential relief could be granted did not compel the Court to refuse the declaration.

In a later case of *Russian Commercial and Industrial Bank* v. *British Bank for Foreign Trade, Ld.* (1), the House of Lords affirmed the decision of the Court of Appeal, who had made a declaration in the action, in which no relief was properly claimed and in which no relief could properly be granted, that under a particular contract a mortgage debt was repayable in roubles and not in sterling. Lord Dunedin took the strongest view in favour of the propriety of making the declaration; the other two noble and learned Lords who took the view that there should be a declaration were rather more doubtful; Lord Sumner stated the circumstances which led him to affirm the decision of the Court of Appeal in this way. He says (2): " There is no doubt a preliminary question, I will not say a separable one—namely, whether the loan was a rouble loan or a sterling loan or more precisely, whether in order to redeem the plaintiffs ought to tender roubles or sterling. This is not a mere question for the plaintiffs to decide for themselves with or without legal advice ; a sufficient issue had arisen before writ between borrowers and lenders to make the question one in the actual dispute between them."

But there is another limitation which has been recognized by the Courts, and that is that where the matter at issue is one which could not in fact arise between the parties, the Court would not make a declaration, because it would in fact, quite apart from other reasons, be useless. In *Hammerton* v. *Earl of Dysart* (3), which was a case relating to a ferry, Warrington J. had found that the plaintiffs could have no relief against the defendants, and therefore the Court of Appeal thought it was not proper, having regard to the character of the case, to make a declaration which might prejudge other cases. Lord Haldane states his view in this way (4): " I will say at once that I am in agreement with the Court of Appeal on this point, and not the less so because the declaration, if made, would not only establish a right,

(1) [1921] 2 A. C. 438.
(2) Ibid. 451.
(3) [1916] 1 A. C. 57.
(4) Ibid. 65.

but would impose on the owner of the franchise ferry a duty, for the breach of which he would be indictable, to provide adequately for the carriage of the public. I propose, accordingly, to deal first with the question of disturbance, for if this is decided in the negative it becomes not only unnecessary but improper to express a conclusion on the question of title."

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In the Court below, the Court of Appeal, Buckley L.J. (1) had stated the matter in this way: "Under Order xxv., r. 5, the Court now has power to make declarations of right whether any consequential relief is or could be claimed or not. The purpose of these last words is not I think to enable a declaration to be made in a litigation between parties in which the plaintiff could under no circumstances obtain relief against the defendant. It is addressed to cases in which no substantive relief can at present be given, not to cases in which substantive relief could never be given. A declaration can under proper circumstances be made so as to bind future rights. The case here is one in which the learned judge has found that the plaintiffs could have no relief against the defendants at all"—for a reason which I need not go into—"In such a case the Court ought not and I think cannot make a binding declaration of right in favour of the plaintiffs."

Applying those cases, while I do not desire in any way to fix any definite bounds to the discretion of the Court under Order xxv., r. 5, I think in the present case that it is clear as matters now stand that the Court can give no relief at all to the plaintiffs. The question of copyright which is before the Court here can only arise in respect of specific actual works, specific actual records or compilations, and it is perfectly clear that there is no question of any infringement of these. As to any further compilations of the same character which may come into existence, it would be most improper for this Court to make any general declaration as to whether they would or would not be the proper subjects of copyright. In order to bring such an issue before the Court there must be specific documents, the character of which can be

(2) [1914] 1 Ch. 822, 838.

established, so that the Court can determine whether or not they are the subjects of literary copyright, and appropriate evidence should be given to show that there has been an infringement of that copyright. In the present case none of these circumstances are present, and I think, under all the circumstances, that it is not a proper case for an exercise of the discretionary power.

There are one or two other matters to which I should like very shortly to refer. I cannot help thinking that, both from the letters which I have read and in the form of the claim, there has not been that precise distinction which is proper between information which is not the subject of copyright and documents which are the subject of copyright —I am only speaking of literary copyright—and it is not at all clear whether rights are being claimed by the plaintiffs—or were being claimed by the plaintiffs, because now of course the matter is more precisely stated—in respect merely of the information instead of in respect of the literary copyright in the strict sense of the term.

As to the decision of the learned judge in this case I think I ought to say, without expressing any final view, that I should hesitate very much before I arrived at the conclusion that these particular entries or books which have been put before the Court are not capable of being the subject of literary copyright. They appear to be—and I state no more than a primâ facie impression—not merely compilations of facts, but compilations in which a selection has been made, and in which figures have been arrived at in certain cases which are not based on actual facts, but are matters of judgment and estimate; having regard to the various definitions and the various cases which have been decided in respect of compilations, I should have felt at least a strong predisposition to the view that these particular books or pages of entries were the subject of literary copyright. But I desire not to deal with that matter, as it is not necessary, and indeed has not been fully argued. Nor do I desire to deal with the question whether the particular gentlemen who compiled these books were doing so so as to vest the copyright

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in the plaintiffs under the terms of s. 5 of the Copyright Act. All that I decide at this moment is that the case is not one in which the Court can properly, or ought properly, to exercise its discretion to make a declaratory judgment under Order xxv., r. 5, and that being so, the appeal must be dismissed with costs.

ROMER L.J. I entirely agree with what has fallen from the Master of the Rolls, and have nothing to add.

GREENE L.J. I agree.

Appeal dismissed.

Solicitors for appellants: *Nicholson & Crouch.*
Solicitors for respondents: *N. A. Woodiwiss & Co.*

W. I. C.

In re LIDDELL'S SETTLEMENT TRUSTS.

C. A.
1936
Feb. 25.

Infants—Wards of Court—Removal out of jurisdiction by mother—British subject out of the jurisdiction but ordinarily resident in England—Jurisdiction to make order requiring mother to bring infants to this country—R. S. C., Order XI., *r.* I (*c*) ; *r.* 8A.

Mrs. L., who was a British subject and the wife of a British subject—both being ordinarily resident in England—took the infant children of the marriage to the United States and was keeping them there without the consent and against the will of her husband. Proceedings were thereupon taken in the Chancery Division to enforce the trusts of a settlement executed by the husband for the benefit of the children, who thereupon became wards of Court; and thereafter an application was made for an injunction restraining Mrs. L. from keeping the infants out of the jurisdiction and requiring her to bring them to this country. Notice of this was duly served upon her, and eventually an order was made by Greaves-Lord J. directing her to bring the infants to England. On appeal:—

Held, (I.) that the Court had jurisdiction to make the order, inasmuch as Mrs. L., having been properly served under Order XI., being ordinarily resident within the jurisdiction, was brought within the reach of the Court and was thus in the same position as if she were in this country; and (2.) that the making of the order was for the benefit of the infants, who as wards of Court should not be permanently resident abroad but ought to be brought to this country.

APPEAL from an order of Greaves-Lord J., sitting as vacation judge.

Mr. and Mrs. Liddell, who were both British subjects domiciled and resident in England, had four infant children of tender years who, before July 24, 1935, were resident in this country. On July 24, 1935, Mrs. Liddell went to the United States, taking with her the four infant children without the consent and against the will of Mr. Liddell. On August 2, 1935, by a settlement made between Mr. Liddell (therein called " the settlor ") and certain trustees, the settlor covenanted to pay to the trustees a certain sum of money which they were to hold and apply for the benefit of the said four infant children. On August 6, 1935, proceedings were commenced in the Chancery Division, the trustees being made defendants, asking for the execution of the trusts of the settlement, and thereby the four infant children became wards of Court. On August 7, 1935, the vacation judge, Hilbery J., made an order that Mrs. Liddell, the mother of the infant plaintiffs, be restrained until after August 28, 1935, or until further order, from keeping the said infants or any of them out of the jurisdiction of the Court, and it was further ordered that the applicant be at liberty to serve Mrs. Liddell at New York or elsewhere in the United States with notice of motion for a mandatory injunction for August 28, 1935. Later, Greaves-Lord J., sitting as vacation judge, made an order for substituted service of the notice of motion upon Messrs. Gordon, Dadds & Co., the solicitors for Mrs. Liddell, as one of the members of that firm held her power of attorney. Still later, namely, on September 25, 1935, Greaves-Lord J. made the following order: " This Court doth order that the respondent the Honourable Calypso Liddell, the mother of the infant plaintiffs, do bring or cause to be brought the infant plaintiffs within the jurisdiction of this Court on or before October 16, 1935, or subsequently within twenty-one days after service of this order upon her. And it is ordered that the plaintiffs be at liberty to serve this order upon the respondent in the United States of America or elsewhere out of the jurisdiction of this Court." That order, which was served on Mrs. Liddell on October 11, 1935, was not complied with, and on November 27, 1935, a writ was issued against Mrs. Liddell's messuages, goods and chattels, which were to be kept under sequestration until she should, by bringing the infant children within the jurisdiction, clear her contempt.

On January 24, 1936, an application was made to Luxmoore J. to discharge the order made on September 25, 1935, by Greaves-Lord J., and that the writ of sequestration should be set aside; but Luxmoore J. refused to make any order.

Mrs. Liddell appealed.

Archer K.C. and *Hon. B. L. Bathurst* for the appellant. The jurisdiction of the Court both in equity and at common law to make an order rests upon the circumstance that the person upon whom the order is made is within the jurisdiction of the Court, that is, is in this country. The Court cannot therefore make an effective order requiring a person who is not in this country to do an act in a foreign country. In *Penn* v. *Lord Baltimore* (1), where specific performance was decreed of articles executed in England concerning boundaries of two provinces in America, the Lord Chancellor said (2): "The conscience of the party was bound by this agreement; and being within the jurisdiction of this Court, which acts in personam, the Court may properly decree it as an agreement." The inference from that statement is that if the party had not been within the jurisdiction the order could not have been made. Again, in *Portarlington (Lord)* v. *Soulby* (3), where the Court was asked to stay proceedings in a foreign Court, it was pointed out by the Lord Chancellor that the jurisdiction to do this was grounded not upon any pretension to the exercise of judicial and administrative

(1) (1750) 1 Ves. Sen. 444. (2) Ibid. 447.
(3) (1834) 3 My. & K. 104, 108.

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rights abroad, but on the circumstance of the person of the party on whom the order is made being within the power of the Court. In *Norris* v. *Chambres* (1) it was said by the Lord Chancellor that "an English Court ought not to pronounce a decree, even in personam, which can have no specific operation without the intervention of a foreign Court, and which in the country where the lands to be charged by it lie would probably be treated as brutum fulmen."

[GREENE L.J. referred to *Duder* v. *Amsterdamsch Trustees Kantoor.* (2)]

All that was done by Byrne J. in that case was to make an order clothing a certain person with the office of receiver to enable him to go to Brazil and there act; there was no order made directing a person to do something abroad. Here the father of the infants, if appointed guardian, can go to the United States and apply to the Courts there for the relief he seeks.

[GREENE L.J. referred to *Tozier* v. *Hawkins.* (3)]

There the Court considered it had a discretion to allow service of a writ in Ireland, Brett M.R. saying that if an injunction was granted "it can be enforced whenever he comes within the jurisdiction." In *Hope* v. *Hope* (4) an English married woman who was in France was ordered to deliver up the children of the marriage (who were with her in France) to the husband in this country with a view to their education here, but in that case the wife was taken to have submitted to the jurisdiction of the Court and thus there was power to make the order. Here there has been no submission to the jurisdiction, and it follows that there was no power to make the order appealed against.

Order XI., which deals with service out of the jurisdiction, enables the Court to make a valid citation of a defendant in circumstances in which previously this could not have been possible. What the Order does not do is, in a case where the person affected is abroad, to say that an action

(1) (1861) 3 De G. F. & J. 583, 584.

(2) [1902] 2 Ch. 132.

(3) (1885) 15 Q. B. D. 680.

(4) (1854) 4 De G. M. & G. 328.

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may proceed against him as if he were actually in this country. [*In re Aktiebolaget Robertsfors and La Société Anonyme des Papeteries de l'Aa* (1) was referred to.]

Harman K.C. and *Roger Turnbull* for the respondent were not called upon.

SLESSER L.J. In this appeal it is convenient at the outset to read the terms of Greaves-Lord J.'s order. The operative words are these: "This Court doth order that the respondent the Honourable Calypso Liddell, the mother of the infant plaintiffs, do bring or cause to be brought the infant plaintiffs within the jurisdiction of this Court on or before October 16, 1935, or subsequently within twenty-one days after service of this order upon her. And it is ordered that the plaintiffs be at liberty to serve this order upon the respondent in the United States of America or elsewhere out of the jurisdiction of this Court."

So far as material, the facts giving rise to this appeal are these: Mr. and Mrs. Liddell have four infant children of tender years all being British subjects, and before July 24, 1935, all were domiciled and resident in this country. On July 24, 1935, Mrs. Liddell went to the United States, taking with her the four children. After she left, a settlement dated August 2, 1935, was made between Mr. Liddell (hereinafter called "the settlor") and trustees by which the settlor covenanted with the trustees to pay to them a certain sum, of which they should stand possessed, to be applied by them for the benefit of the settlor's said children. On August 6 proceedings were taken in the Chancery Division in the matter of the trusts of that settlement, the trustees being made defendants, asking for the execution of the trusts of the settlement. Thereby the infants became wards of the Court and must be treated on that footing, and the Court became concerned to protect them. During the Long Vacation of 1935 applications were made to the vacation judge to restrain Mrs. Liddell from keeping the children out of the jurisdiction. An ex parte injunction was granted on August 7, 1935, by

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(1) [1910] 2 K. B. 727.

Hilbery J., and on August 26 a further interim injunction was granted. By leave of the Court these orders were served upon Mrs. Liddell on September 16, 1935. These, however, are not the orders in relation to which the present appeal is brought. The order from which this appeal is brought was obtained in the following way : an order dated September 18, 1935, was made that the plaintiff be at liberty to serve Mrs. Liddell with notice of motion for a mandatory injunction, and liberty was given for substituted service of that notice of motion on Messrs. Gordon, Dadds & Co., the solicitors for Mrs. Liddell. On September 25, 1935, Greaves-Lord J. granted an injunction restraining Mrs. Liddell from keeping the children out of the jurisdiction of the Court and requiring her to bring them to this country. That order was served on Mrs. Liddell on October 11, 1935.

It is now said that Greaves-Lord J. was wrong in making that order and the consequential order. That notice of the proceedings could properly be served on Mrs. Liddell is clear. Mrs. Liddell is married to a British subject, is herself a British subject, and is ordinarily resident within the jurisdiction. That is one of the grounds under Order XI., r. 1 (*c*), upon which a writ may be served out of the jurisdiction. Here the question of the service of a writ out of the jurisdiction does not arise, because in form this is an action in which Mrs. Liddell is not the defendant ; the trustees of the settlement are the defendants, and so the case falls within Order XI., r. 8A (*d*), which allows service out of the jurisdiction of " any summons, order, or notice in any proceedings duly instituted whether by writ of summons or other such originating process as aforesaid." Those are extremely wide words. But our attention has been called to *In re Aktiebolaget Robertsfors and La Société Anonyme des Papeteries de l'Aa* (1), in which it was decided that there is no jurisdiction under Order XI., r. 8A, to grant leave for service out of the jurisdiction of a summons except in the circumstances in which there is jurisdiction under Order XI., r. 1, to grant leave for service out of the jurisdiction of a writ of summons. In the present case there was sufficient power if there was a right to serve a person domiciled or ordinarily resident within the jurisdiction. In these circumstances it seems to me that Mrs. Liddell was within the reach of the Court. The principle we have to consider is clearly stated in Kerr on Injunctions (6th ed.), p. 11, thus: "In granting injunctions the Court operates in personam. The person to whom its orders are addressed must be within the reach of the Court or amenable to its jurisdiction. But the Court will not suffer any one within its reach to do what is contrary to its notions of equity, merely because the act to be done may be, in point of locality, beyond its jurisdiction. As a consequence of the rule, that in granting an injunction the Court operates in personam, the Court may exercise jurisdiction independently of the locality of the act to be done, provided the person against whom relief is sought is within the reach and amenable to the process of the Court. This jurisdiction is not grounded upon any pretension to the exercise of judicial or administrative rights abroad, but on the circumstance of the person to whom the order is addressed being within the reach of the Court." We were told that there was little or no authority upon the particular point whether there was jurisdiction in such circumstances to make such an order. Before the General Orders of 1883 it was pointed out by Cotton L.J. in *In re Busfield, Whaley* v. *Busfield* (1) that "service out of the jurisdiction is an interference with the ordinary course of the law, for generally Courts exercise jurisdiction only over persons who are within the territorial limits of their jurisdiction." Then, speaking of the Orders of 1883, the Lord Justice said: "We must deal with the present case under the General Orders of 1883, and there is nothing in them to authorise service of an originating summons out of the jurisdiction. The general Order as to service out of the jurisdiction was in my opinion intended to form a complete code on that subject, and to shew when such service could, and when it could not, be effected." Such machinery is procedural only; it is not in itself a change in the law; it is merely adjectival, enlarging the procedure.

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(1) [1910] 2 K. B. 727.

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(1) (1886) 32 Ch. D. 123, 131.

That I think is made clear in *Duder* v. *Amsterdamsch Trustees Kantoor* (1), which was an action against a Dutch corporation as trustees of a debenture deed and the receivers appointed under the deed to enforce a prior equitable charge made in England upon property and assets in Brazil and then vested in the first defendants. It was held that as the first defendants were necessary and proper parties to the action within Order XI., r. 1 (*g*), and as the Court had jurisdiction to grant the relief asked, service of the writ on the first defendants ought to be allowed. It was argued (2) that " it is only by operating in personam and not in rem that the Court makes any order respecting property situate out of the jurisdiction ; and there is no precedent for the exercise of the jurisdiction in personam unless the defendant, against whom relief is sought, is within the jurisdiction." That argument did not find favour with Byrne J., who said (3) : " But it is argued that there is no precedent or authority for the exercise of the jurisdiction in personam, unless against persons actually within this country, and that to allow service of notice of writ upon a foreigner resident abroad, and then to act in personam against him, would in effect be to enlarge or extend the jurisdiction of the Court in a manner not authorised by principle or authority. It has been several times laid down that the rules under the Judicature Acts are rules of procedure only, not intended to affect, and not affecting the rights of parties." Again, Byrne J. said this (4) : " In the present case, the service is authorised by the terms of the rule I have referred to, and I consider that to allow service in accordance with that rule is not to extend jurisdiction, but to enable the old jurisdiction to be exercised in a case where, at one time, it could not have been exercised by reason of defective rules of procedure." In other words, although it may from time to time be a question to be considered whether the adjectival machinery is sufficiently addressed to a person out of the jurisdiction so as to bring him within the reach of the Court, the principle is that where an order is addressed so as to bring him within the reach of the Court, the Court may grant an injunction irrespective of the locality of the act to be done. That to my mind is made quite clear by *Hope* v. *Hope*. (1) In 1854, when that case was decided, it was wellnigh impossible to serve out of the jurisdiction. There the married lady against whom an order was sought to compel her to bring back her children to this country had, as the Lord Chancellor thought, by her actions submitted to the jurisdiction. She was therefore in the same position as a person to whom a writ had been properly addressed under the existing rules, and being in that position she had submitted to the jurisdiction. She was therefore ordered by the Lord Chancellor in the first place to concur with her husband in taking the necessary steps to bring the children to England, and on the difficulty arising by reason of the French Court thinking that an appeal to the House of Lords suspended the operation of the order appealed from, the Lord Chancellor prefaced his order with a declaration that by the law of England an appeal to the House of Lords does not suspend the execution of an order of the Lord Chancellor, unless he thinks fit so to order, and with that declaration he ordered Mrs. Hope within a week to deliver up the children to their father or otherwise to concur with him in taking such steps as might be necessary for authorizing them to be delivered up according to the laws of France. In other words, when the lady was brought within the jurisdiction of the Court the Lord Chancellor had no hesitation in making the order he did. That is a useful case illustrating the general principle. That being so I am clearly of opinion that Greaves-Lord J. had full jurisdiction to make the order he did.

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(1) [1902] 2 Ch. 132.
(2) Ibid. 137.
(3) Ibid. 142.
(4) Ibid. 143.

It has been said that this Court will not make an order which will be mere brutum fulmen. It seems that there has been a writ of sequestration. We are not to assume that the lady will necessarily disobey the Court or ignore the sanction imposed if she continues contumacious. Once jurisdiction is established, the power of the Court, as the guardian of the trusts of these children, to make the order is clear.

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(1) 4 De G. M. & G. 328.

With regard to the second appeal I can dispose of it with this observation, that on the application to discharge the order of Greaves-Lord J., Luxmoore J. came to the conclusion that by reason of the operation of Order LXIII., r. 12, he had no jurisdiction to interfere. However that may be, if, as is shown, Greaves-Lord J. had jurisdiction to deal with the matter in the way he did, and there being no change of circumstances to justify the application to discharge it, it follows that the second appeal must be dismissed.

ROMER L.J. I agree. It is plain that this Court has jurisdiction to order a person in this country to perform an act abroad; but it is said that this Court has no jurisdiction to make an order requiring a person resident abroad to do an act there. Notwithstanding the strenuous argument of Mr. Archer it appears to me that his proposition is wholly untenable. The moment a person is properly served under the provisions of Order XI. that person, so far as the jurisdiction of this Court is concerned, is precisely in the same position as a person who is in this country. It is said, however, that even if there was jurisdiction to make the order appealed from it should not have been made, as it is not for the benefit of the children. I agree that the benefit of the children is the first consideration for the Court. In my opinion the children of British parents who are wards of Court should not, in the absence of special circumstances, be permanently resident abroad, and it is plainly right and for the benefit of the children in the present case that they should be brought to this country. It has been further contended that even so this order can never be enforced against Mrs. Liddell if she chooses to disobey it and that the sequestration of her income would not be for the benefit of the children. It is not the habit of this Court in considering whether or not it will make an order to contemplate the possibility that it will not be obeyed.

C. A.
1936
LIDDELL'S SETTLEMENT TRUSTS, *In re.*

GREENE L.J. I so entirely agree with the judgments which have been delivered that I find it unnecessary to add anything.

Appeal dismissed.

Solicitors for appellant: *Gordon, Dadds & Co.*
Solicitors for respondent: *William Charles Crocker.*

J. S. H.

CLAUSON J.
1935
May, 2, 3, 7, 8, 10, 20.

SHIPLEY URBAN DISTRICT COUNCIL *v.* BRADFORD CORPORATION.

[1934. S. 3209.]

Contract—Construction—Rectification—Mutual Mistake—No actual concluded contract antecedent to instrument sought to be rectified—Effect given to concurrent intention of parties when executing instrument constituting the only contract between them.

In an action for a declaration that, upon the true construction of an agreement under the seals of a district Council and a city Corporation for an additional supply of water to the Council by the Corporation therein expressed to be "at a pro rata charge as 540*l.* is to 450,000 gallons subject to measurement," the Council were entitled to such additional supply at a pro rata charge of 540*l.* "per annum" for 450,000 gallons "per diem" or in the alternative, for rectification of the agreement on the ground of mutual mistake, by the insertion therein of the words "per annum" and "per diem":—

Held, that the agreement bore the construction which the Council claimed to have placed upon it.

Held, also, that if that construction were wrong the Court would, notwithstanding the absence of any antecedent binding contract, rectify the instrument of agreement, so as to give effect to what was proved to have been the concurrent intention of the parties at the moment of executing the same—namely, to contract on the basis of a payment of 540*l.* "per annum" for a supply of 450,000 gallons "per diem" subject to measurement.

Dicta of Younger J. in *Faraday* v. *Tamworth Union* (1916) 86 L. J. (Ch.) 436, at p. 438, and of Romer J. in *Higgins (W.), Ld.* v. *Northampton Corporation* [1927] 1 Ch. 128, at pp. 136, 137, disapproved.

The statement in the judgment of James V.-C. in *Mackenzie* v. *Coulson* (1869) L. R. 8 Eq. 368, at p. 375: "It is always necessary for a plaintiff to show that there was an actual concluded contract antecedent to the instrument which is sought to be rectified; and that such contract is inaccurately represented in the instrument" does not warrant the suggestion that the jurisdiction of the Court cannot be exercised, even in cases of clear mutual mistake in the attempt to embody in the instrument the concurrent intention of the parties existing at the moment of the execution of the instrument, unless a previously existing contract can be proved.

WITNESS ACTION.

The plaintiffs (hereinafter called "the Council") and the defendants (hereinafter called "the Corporation") were the water authorities and suppliers of water to consumers in their respective areas.

Under or by virtue of two leases dated respectively April 28, 1903, and November 28, 1905, the Council were entitled to certain rights to draw water from lands belonging to one Ferrand forming part of Rombald Moor at Bingley in the county of York during terms expiring in 1943 and 1945 and at annual rents of 250*l.* and 290*l.* respectively, making a total of 540*l.* per annum.

In or about the year 1910, the Corporation purchased the fee simple of those lands from Ferrand subject to the leases of 1903 and 1905 of the water-rights in favour of the Council.

In the year 1912 the Council, being apprehensive as to the effect on their water undertaking and supplies of the said lands having passed into the possession of the Corporation, promoted a bill in Parliament to secure an Act to enable them to acquire compulsorily from the Corporation the lands from which they were drawing their water supplies under the said leases and to provide that the compensation to be paid to the Corporation for their estate and interest therein should be the price which the Corporation had paid when they purchased the same.

The bill was opposed by the Corporation and negotiations followed, conducted between Sir James Roberts on behalf of the Council and Alderman Gadie on behalf of the Corporation, the result of which was an oral agreement the terms of which were embodied in a letter dated March 25, 1912, and written by Sir James Roberts to Alderman Gadie: "It would afford me much pleasure if I could state at a meeting of the Shipley Council to-morrow night that I thought it likely that a basis for agreement had been arrived at with respect to water-supply and Rombald's Moor. The exact terms of the arrangement need not be stated. Will you be good enough to telephone me some time to-morrow, giving me permission to make such a statement? After the repetition by myself of the arrangement and also by Alderman Land and yourself, it is hardly necessary to restate it in writing, but all the same I take the liberty of doing so. The terms are that, should Shipley require further water from Rombald's Moor, the same might be obtained on the same basis of price as that contained in the two leases from Ferrand of 1903 and 1905 under which Shipley obtains '450,000 gallons per day for 540*l.* per annum,' and that in order to avoid clashing, the zone from which Shipley is to obtain its increased supply to be delineated, it being understood that within the zone there should be a possibility of obtaining what Shipley may require. There are to be no restrictions as to the right of Shipley's access to the moors. The right to pasture 30 head of cattle on the moor which Ferrand possesses under his agreement with your Corporation is to be abrogated. Your Corporation are to do nothing which would have the effect of draining away any water within the delimited Shipley zone. A lease in perpetuity is to be granted, both for present and any future supply."

Ultimately on April 4, 1912, a provisional agreement was signed by representatives of the Council and representatives of the Corporation whereby it was agreed that the Council should withdraw all clauses in the bill intituled "Shipley Urban District Council Act, 1912," relating to the purchase of lands from the Corporation subject to certain conditions of which the following are material: "All rights held by the Council under the 1903 and 1905 agreements with Ferrand to be preserved.

"If the Council require additional water, they must first exhaust the resources of the lands coloured blue on the plan hereto annexed and, if there should be any dispute as to those resources on the said lands coloured blue, the Corporation shall ascertain at their own cost if there is any further water to be obtained in the lands coloured blue, and if a quantity of 50,000 gallons per day shall be found, then the Council will forthwith thereafter pay to the Corporation all the costs of works incurred by them in providing such water in addition to the price pro rata for such water.

"If the Corporation execute any works on the lands pink on the plan and thereby reduce the present yield from the two springs acquired by Shipley under the agreements or leases of 1903 and 1905, then the Corporation shall make up the difference in quantity between the yield after those operations and the present yield.

(Clause 5) "If sufficient water cannot be found to satisfy Shipley's requirements on the blue lands, further facilities to be provided by the Corporation on lands pink, subject at all times to the Corporation having reserved to them a maximum of 250,000 gallons a day: all additional supplies either on the lands pink or blue to be paid for by Shipley 'at a pro rata charge as is 540*l*. for 450,000 gallons subject to measurement.'

(Clause 6) "In case Shipley require further additional water from the said lands and the Corporation at such period are taking water from the said lands, then the Corporation shall provide for Shipley from any other source the same quantity of water of satisfactory quality taken by the Corporation from such lands at the same rate as is paid by Shipley under the 1903 and 1905 agreements subject as aforesaid. The Corporation are not to be expected to provide any water at the pro rata charge beyond what the said lands pink and blue yield.

"The Corporation to execute a lease making the rights of the Council under the old leases of 1903 and 1905 and the additional rights under the agreement of April 4, 1912, perpetual."

Discussions arose as to the form of the lease, the drafts thereof which passed between the parties clearly indicating that it was intended by both parties that the rent of 540*l*. should be an annual rent and that the yield of 450,000 gallons of water should be a daily yield.

The parties having failed to agree upon the form of the lease, on May 6, 1912, a written agreement under the seals of the Council and the Corporation was executed which repeated precisely the terms of the provisional agreement of April 4, and there was added a submission to arbitration of every question which should arise between the parties in relation to the premises.

The bill before Parliament was accordingly amended by the deletion of the provisions relating to the compulsory purchase of the lands of the Corporation.

By the Shipley Urban District Council Act, 1912, s. 5, the Corporation were empowered to lease or grant to the Council and the Council were empowered to take a lease or grant of any rights over the lands forming part of Morton Moor and Bingley Moor which the Corporation were entitled to exercise.

By a letter dated June 27, 1934, the Council called the attention of the Corporation to clause 5 of the agreement of May 6, 1912, and required the additional supply of water in pursuance of that agreement: and stated that both parties to that agreement intended that the price to be paid for the additional supply was to be at the rate of 540*l.* per annum for 450,000 gallons a day subject to measurement, and asked the Corporation to enter into a supplemental agreement amending clause 5, so as to make the concluding words read "at a pro rata charge as is 540*l.* per annum for 450,000 gallons a day subject to measurement."

Upon the refusal of the Corporation to comply with that request of the Council, the Council brought an action in which they claimed a declaration that, upon the proper construction of the agreement of May 6, 1912, they were entitled to additional supplies thereunder at a pro rata charge of 540*l.* "per annum" for 450,000 gallons "per diem": in the alternative, rectification of that agreement by inserting in clause 5 thereof the words "per annum" immediately after the figure "540*l.*" and the words "per diem" immediately after the words "450,000 gallons."

The Council in their statement of claim alleged that the mistake common between the parties at the time when the agreement of May 6, 1912, was executed consisted in their mutual belief that each of the agreements of April 4, 1912, and May 6, 1912, provided, as indeed it was intended by the parties to those agreements, that the Council should be entitled to the additional supplies of water therein specified at a charge pro rata of 540*l.* per annum for 450,000 gallons per diem subject to measurement, and that, in making such provision, those agreements gave effect to a previous oral agreement provisionally arrived at two days before the provisional agreement of April 4, 1912, namely, on April 2, between the respective representatives of the Council and the Corporation that the Council should pay for the additional supplies at a charge pro rata of 540*l.* per annum for 450,000 gallons a day.

The Corporation by their defence denied the right of the Council to the declaration they claimed and also the alternative right which they claimed, to have the agreement of May 6, 1912, rectified. They denied that that agreement was executed under a mutual mistake and alleged that the agreement of May 6, 1912, being the only contract under the seal of the Corporation, was incapable of rectification, the Corporation being incapable of entering into any contract with the Council other than a contract under their seal.

The Corporation further pleaded laches, acquiescence and delay on the part of the Council and pleaded that the Council were fully aware of the common mistake alleged by them as early as the year 1923, and in support of that defence referred to certain correspondence between the parties—namely, a letter from the Council applying to the Corporation for additional supplies of water in pursuance of the agreement of May 6, 1912, and a letter from the Town Clerk of the Corporation in reply dated October 16, 1923, in which he wrote: "I am not sure whether you have appreciated that the price specified in the agreement of May 6, 1912, works out at 24*s.* per 1000 gallons. The Corporation themselves consider this price excessive and would be prepared to let you have the supply at a considerably lower figure. If arrangements are made for you to take the water at a lower figure, an agreement will be necessitated. I suggest that you should make an offer specifying the price." The Corporation alleged that the Council took no steps in answer to their suggestion and must be taken to have withdrawn their application for the additional supplies.

[As the case is reported only on the question of rectification, the arguments of counsel on that question only are stated.]

Cyril Radcliffe K.C. (*R. M. Montgomery K.C.* with him) for the plaintiffs. Assuming that the Court gives a strict literal construction to the words used in clause 5 of the instrument of May 6, 1912, the Court will, on proper evidence that the instrument does not give effect to the common intention of the parties who executed it, rectify the instrument so as to give legal effect to that common intention which the written instrument by the mutual mistake of the parties failed to express; and will do so none the less, if the instrument sought to be rectified happens to be the only enforceable agreement between the parties; since, as the reported decisions and eminent text-book writers show, it is not essential that there should have been any actually concluded agreement antecedent to the instrument of which rectification is sought. To that end, the Court will receive evidence to show what was the real intention of the parties at the moment of their executing the instrument constituting the contract: *Simpson* v. *Vaughan* (1); *Lackersteen* v. *Lackersteen* (2), where, on proof that the solicitor had exceeded his instructions, the Court, at the suit of the settlor and in the absence of any written instructions, rectified a voluntary settlement on parol evidence as to the real intention of the parties; *Hanley* v. *Pearson* (3), where the Court rectified a settlement in favour of a settlor upon his own evidence alone: see also *Welman* v. *Welman* (4) and *Johnson* v. *Bragge* (5), where, notwithstanding the Statute of Frauds, parol evidence was admitted to prove a mistake by a friendly solicitor in drawing a settlement which, at the instance of a party taking a benefit under it, was rectified. Here the evidence sufficiently proves that the parties were labouring under a common mistake and intended at the moment they executed the instrument to enter into some other contract than that expressed in that instrument: *Fowler* v. *Fowler* (1); and it has been proved by evidence contemporaneous with or anterior to the instrument of May 6, 1912, what was the real contract which the parties intended to enter into: *Bradford* (*Earl*) v. *Romney* (*Earl*) (2); *Bentley* v. *Mackay* (3), where Turner L.J. states the reason for the rule, that it must be proved what was really intended by the parties, that if the parties took different views of what was intended there would be no contract between them which could be carried into effect by rectifying the instrument. For the proposition that the Court has jurisdiction to rectify clause 5 of the instrument by adding the words " per annum " and " per diem," even in the absence of any actually concluded agreement antecedent to the instrument of May 6, 1912, and when that instrument constitutes the only agreement between the parties, the following are authorities: *Henkle* v. *Royal Exchange Assurance Co.* (4), where Lord Hardwicke L.C. said: " No doubt but this Court has jurisdiction to relieve in respect of a plain mistake in contracts in writing as well as against frauds in contracts; so that, if reduced into writing contrary to intent of the parties, on proper proof that would be rectified ": *Baker* v. *Paine* (5), where the same Lord Chancellor said: " How can a mistake in an agreement be proved but by parol evidence? It is not read to contradict the face of the agreement which the Court would not allow, but to prove a mistake therein, which cannot otherwise be proved ": *Shelburne* v. *Inchiquin* (6); *Murray* v. *Parker* (7), where Sir John Romilly M.R. said: " If there be no previous agreement in writing, parol evidence is admissible to show what the agreement really was " and " to justify the Court in

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(1) (1739) 2 Atk. 31.

(2) (1860) 30 L. J. (Ch.) 5.

(3) (1879) 13 Ch. D. 545.

(4) (1880) 15 Ch. D. 570.

(5) [1901] 1 Ch. 28.

(1) (1859) 4 De G. & J. 250.

(2) (1862) 30 Beav. 431, 439.

(3) (1862) 4 De G. F. & J. 279, 286.

(4) (1749) 1 Ves. Sen. 317, 318.

(5) (1750) 1 Ves. Sen. 456, 457.

(6) (1784) 1 Bro. C. C. 339, 342.

(7) (1854) 19 Beav. 305, 308.

reforming an executed deed, it must appear that there has been a mistake common to both the contracting parties and that the agreement has been carried into effect by the deed in a manner contrary to the intention of both": *Rooke* v. *Lord Kensington* (1), where Page Wood V.-C. said that "in order to enable the Court to rectify a settlement, it must be proved that it contains something which has been inserted by mistake contrary to the intention of all the parties."

In *Bradford* (*Earl*) v. *Romney* (*Earl*) (2) Sir John Romilly M.R. said: "It is open, at all times, to show that the settlement, as drawn, was not in accordance with the real intention of the parties to the contract, and to have the same rectified so as to make the deed in all respects correspond with the intentions." True it is that in *Mackenzie* v. *Coulson* (3) James V.-C. said: "It is always necessary for a plaintiff to show that there was an actual concluded contract antecedent to the instrument which is sought to be rectified." That statement is to some extent explained by the immediately preceding words: "Courts of Equity do not rectify contracts; they may and do rectify instruments purporting to have been made in pursuance of the terms of contracts." The actual decision is correct, because there was evidence which satisfied the Court that the document which the plaintiff sought to have rectified did in fact represent what the defendant, the assured, agreed to and the only thing that the defendant was willing to agree to. There was no mistake there on the part of the defendant: there never was any contract other than the policy which the plaintiffs signed. That statement of the law was referred to by Cozens-Hardy M.R. in the course of the argument in *Schofield* v. *W. C. Clough & Co.* (4) without comment. In *Faraday* v. *Tamworth Union* (5) Younger J. decided that on the facts there had been no actual mistake; and added that even if there had been one, the Union had attached their seal to no agreement in a form other than the one they had executed, and to rectify that agreement so as to make it binding on them in terms other than those which they had sealed would have had the effect of binding them to an agreement which required a seal for its validity but which they had never sealed; and in *Higgins (W.), Ld.* v. *Northampton Corporation* (1) there is a dictum of Romer J. to much the same effect. He said there was no parol contract at all, no contract of any kind at all, until the contract under seal was executed. Neither of those statements was more than dictum, and they are inconsistent with the authorities cited and with a decision of Grantham J. in *McCartney* v. *Brighton Corporation.* (2) Those dicta proceed upon the fallacy that, when a Court of equity rectifies a document, the document so rectified is not the actual deed of the parties who execute it. The Court rectifies instruments, not contracts, and what the Court rectifies is the instrument which the Court has been satisfied on the evidence failed, as by mutual mistake, to carry out the real intention of the contracting parties at the moment they executed it. The Court will rectify a deed (even one enrolled under the Fines and Recoveries Act) so as to restore it to the form in which the parties who executed it really intended it should be: *Hall-Dare* v. *Hall-Dare* (3); *Meeking* v. *Meeking.* (4) The conditions stated by Warrington L.J. in *Craddock Bros.* v. *Hunt* (5) upon which the jurisdiction of the Court to rectify a written document depends have been fulfilled in this case. The decision in that case was approved by the Judicial Committee of the Privy Council in *United States* v. *Motor Trucks, Ld.* (6), where it was proved that both parties to a written contract intended certain lands and buildings to be included in the contract which had been inadvertently omitted and rectification followed. The following eminent text-book writers state the law to the same effect: Story on Equity Jurisprudence (1886), 13th ed., paras. 153–159, referred to with approval by Warrington L.J. in *Craddock Bros.* v. *Hunt* (5); see also 2nd English ed. (1892), paras. 153–159. "Equity interferes in cases of written agreements, where there has been an innocent omission or insertion of a material stipulation, contrary to the intention of both parties, and under a mutual mistake"; see para. 155: the 1892 ed. has para. 164 b (p. 100) (omitted from previous editions): "In applications to rectify a settlement or to reform a contract, on the ground of mistake, the question to be considered is, not what the parties would have done, had they been able to anticipate subsequent developments; but what was their intention at the time the contract was executed": see also Story on Equity, 3rd ed. (1920), paras. 153 et seq.; Pollock's Principles of Contract (1921), 9th ed., p. 556: "If there be no previous agreement in writing, the modern rule is that a deed may be rectified on oral evidence of what was the real intention of the parties at the time, if clear and uncontradicted"; p. 558: "There must be clear proof of a real agreement [between] both parties different from the expressed agreement"; Addison on Contracts, 11th ed., p. 184.

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(1) (1856) 2 K. & J. 753, 764.
(2) 30 Beav. 431, 438.
(3) (1869) L. R. 8 Eq. 368, 375.
(4) [1913] 2 K. B. 103, 105.
(5) (1916) 86 L. J. (Ch.) 436.

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(1) [1927] 1 Ch. 128.

(2) Reported only in The Times for May 21, 1904.

(3) (1885) 31 Ch. D. 251.

(4) [1917] 1 Ch. 77.

(5) [1923] 2 Ch. 136, 159, 160.

(6) [1924] A. C. 196.

Fergus Morton K.C. and *J. V. Nesbitt* for the defendants. The statement of the law by James V.-C. in *Mackenzie* v. *Coulson* (1) already referred to is correct and applies to all instruments other than voluntary dispositions: that statement was repeated verbatim by Cozens-Hardy M.R. in the Court of Appeal without any indication of disapproval in *Schofield* v. *W. C. Clough & Co.* (2)

In a suit for rectification it is necessary for the plaintiff to show an actual concluded contract antecedent to the instrument which he seeks to have rectified and that such contract is inaccurately represented in the instrument. That rule applies to all cases, except to the case of a voluntary settlement to which the rule does not apply, because the Court will not grant relief at the suit of a volunteer. In this case the defendant Corporation could only contract under its seal, and the only contract under its seal was the instrument of May 6, 1912; from which it follows that there could have been no antecedent binding contract, an essential condition of obtaining rectification. In *Bentley* v. *Mackay* (3) it was observed by

(1) L. R. 8 Eq. 368, 375.

(2) [1913] 2 K. B. 103, 105.

(3) 4 De G. F. & J. 279, 286.

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Turner L.J. that it was necessary not only to prove a mutual mistake, but also what was intended to be done in order that the instrument might be set right according to what was so intended, for if the parties took different views of what was intended there could be no contract between them which could be carried into effect by rectification. Here, no contract before May 6, 1912, has been proved: the parties negotiating were, as the evidence shows, never ad idem until May 6, 1912: the parties, taking different views of what was intended, the defendant Corporation is entitled to assume that the instrument executed on that date was understood and intended by the plaintiffs to operate in accordance with the clear and unambiguous language used. Even in the case of a voluntary settlement, the Court hesitates to act at the instance of the settlor on his own evidence as to his intention unsupported by other evidence, such as written instructions: *Bonhote* v. *Henderson.* (1) The Court here is being asked, in the absence of proof of an antecedent concluded agreement, to impose upon the parties a legally binding obligation which was never agreed to. The statement of the law by James V.-C. before referred to is supported by authorities before 1869 or, at any rate, there is no case in which it appears clearly that there has been rectification without such an antecedent agreement as James V.-C. referred to: see *Simpson* v. *Vaughan* (2); *Henkle* v. *Royal Exchange Assurance Co.* (3); *Baker* v. *Paine* (4); *Shelburne* v. *Inchiquin* (5); *Rooke* v. *Lord Kensington* (6); *Elwes* v. *Elwes* (7); *Bradford* (*Earl*) v. *Romney* (*Earl*) (8); and more modern cases after 1869: *Hanley* v. *Pearson* (9); *Welman* v. *Welman* (10); *Hall-Dare* v. *Hall-Dare* (11); *Johnson* v. *Bragge* (12); *Meeking* v. *Meeking* (13). In *Faraday* v. *Tamworth Union* (14) and in *Higgins* (*W.*), *Ld.* v. *Northampton Corporation* (15) Younger J. in the first case and Romer J. in the

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(1) [1895] 1 Ch. 742.
(2) 2 Atk. 31.
(3) 1 Ves. Sen. 317, 318.
(4) Ibid. 456.
(5) 1 Bro. C. C. 339, 342.
(6) 2 K. & J. 753, 764.
(7) (1861) 3 De G. F. & J. 667.
(8) 30 Beav. 431, 439.
(9) 13 Ch. D. 545.
(10) 15 Ch. D. 570.
(11) 31 Ch. D. 251.
(12) [1901] 1 Ch. 28.
(13) [1917] 1 Ch. 77.
(14) 86 L. J. (Ch.) 436.
(15) [1927] 1 Ch. 128.

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second case approved the statement of the law by James V.-C. Romer J. said (1): "Where"—as is the case here—"there is no precedent contract between the parties, I cannot see that I have any jurisdiction to make a different contract between the parties from the only one which exists merely because I come to the conclusion that both parties previously to making that contract had intended to make a different one." In *Craddock Bros.* v. *Hunt* (2) Warrington L.J. laid down the conditions under which the jurisdiction to rectify a written instrument could be exercised: that there must be an antecedent contract and a common intention of giving effect to the whole of that contract by the written instrument, and there must be clear evidence that the instrument by common mistake failed to give effect to such contract and either contained provisions not agreed upon or omitted something that was agreed upon or otherwise departed from its terms. In *United States* v. *Motor Trucks, Ld.* (3), Lord Birkenhead said that the plaintiff must show an actually concluded agreement antecedent to the instrument which is sought to be rectified and that such agreement has been inaccurately represented in the instrument. The statement of the law by James V.-C. is supported by passages in the following text-books: Williams on Vendor and Purchaser (1910), 2nd ed., vol. i., pp. 782, 783; approved of by Warrington L.J. in *Craddock Bros.* v. *Hunt* (4); Halsbury's Laws of England (1912) ed., vol. 21, p. 21, para. 39. It is significant that in the 2nd ed. (1881) of Fry on Specific Performance, after the decision in *Mackenzie* v. *Coulson* (5) in 1869, para. 758 on p. 340 was added, which had not appeared in the 1st ed. of 1858, and it is as follows: "It follows from the nature of the jurisdiction that there can be no rectification where there is not a prior actual contract by which to rectify the written document" and as authority for that statement *Mackenzie* v. *Coulson* (5) is cited. That paragraph in the 6th ed. (1921) is para. 791 on p. 372. So, too, in Kerr on Fraud and Mistake, 5th ed. (1920),

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(1) [1927] 1 Ch. 136.

(2) [1923] 2 Ch. 136, 159.

(3) [1924] A. C. 196, 200.

(4) [1923] 2 Ch. 136, 160.

(5) L. R. 8 Eq. 368.

p. 530, the same statement occurs, a statement which is omitted from the 1st ed. of 1868, and the 2nd ed. of 1883: Anson on Contracts, 17th ed. (1929), p. 321.

Montgomery K.C. replied. In *Elwes* v. *Elwes* (1)—relied upon by defendants' counsel—the statement of Turner L.J. that, to establish his case, the plaintiff had to prove an agreement that there should be introduced into the settlement certain provisions in favour of the plaintiff's daughters, did not mean that there must be an antecedent concluded agreement. The word agreement, as so used, may be treated as synonymous with intention. He said that, to grant the plaintiff's prayer would be, not to correct the settlement according to the agreement of the parties, but to add to their agreement a term which had never been even agitated between them. The effect of the decision in *Mackenzie* v. *Coulson* (2) is to show the necessity of proving that consensus ad idem in the minds of the parties existed at the moment of executing the instrument of contract sought to be rectified or, if existing at some anterior time, continued up to the moment of execution; that is to say, consensus to the inclusion or exclusion, as the case might be, of a certain term in or from the instrument. This is borne out by all the judgments in *Hall-Dare* v. *Hall-Dare* (3), where Lindley L.J. said: "That section" (referring to s. 47 of the Fines and Recoveries Act) "assumes, however, that the document enrolled represented the intention of the parties when they executed it, and was the deed which they intended to execute": and by *Craddock Bros.* v. *Hunt* (4) and *United States* v. *Motor Trucks, Ld.* (5), see Lord Birkenhead's judgment at p. 202: "Both parties intended the lands and buildings to be included in the schedule. These were inadvertently omitted," and rectification followed in the absence of any ground for excluding that remedy. In White and Tudor's L. Cas. (1866), 3rd ed., vol. i., p. 36, it is stated: "When the Court interferes to rectify a deed, it inquires what was the intention of the parties at the time when the deed was executed" ; in the 9th ed. (1928), vol. ii, p. 746, to the same effect.

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(1) 3 De G. F. & J. 667, 679.
(2) L. R. 8 Eq. 368.
(3) 31 Ch. D. 251, 259.
(4) [1923] 2 Ch. 136.
(5) [1924] A. C. 196.

In John Sidney Smith's Principles of Equity (1856), at pp. 128, 129, there is a statement to the same effect : "The Court will relieve in cases of written agreements where, by mistake, there has been an omission, or insertion of a material stipulation contrary to the intention of the parties, and such mistake is clearly made out by satisfactory proof" and "the mistake may be established from the document itself" or "may be implied from the nature of the transaction." Upon the question of construction, the rule of law which applies in cases of rectification applies also in cases of construction, that the document must be construed according to the intention of the parties, except that, whereas in cases of rectification the real intention does not appear in the document itself—in fact the contract expressed on the face of the document, without more, is, through the admission of extraneous evidence, shown to be not in accordance with the real intention of the parties—in cases of construction, the intention of the parties must be gathered from the words used in the document, though, no doubt, interpreted in the light of the material facts known to the parties at the time when the document was executed.

Cur. adv. vult.

1935. May 20. CLAUSON J. In this case the plaintiffs, the Shipley Urban District Council, sue the Bradford Corporation for a declaration deciding the charge which, according to the true construction of an agreement dated May 6, 1912, made between the Council and the Corporation, is to be made by the Corporation against the Council for the supply of certain water.

By way of alternative, the Council claim rectification of the agreement by the insertion of certain words which, if inserted, will make it plain that the rights of the Council are such as they claim them, on the true construction of the agreement as it stands, to be. [His Lordship then stated what facts it was admissible to prove on the question of the construction of the document and by what means such facts might be proved and after referring to *Inland Revenue Commissioners* v. *Raphael* (1) continued :]

So far as the alternative claim in this action is concerned, namely, the claim for rectification, the Court is free to listen to evidence (and here, again, I quote the same authority) that there has been a real intention and a real mistake in expressing that intention. These matters may be established by extrinsic evidence.

At an early stage in the hearing of this case, it became clear that it was practically impossible to confine the evidence in the first instance to such as was properly admissible on the principal claim, namely, that for construction, and I received evidence on the issues as a whole, some of which was obviously inadmissible on the simple question of construction. While that course was convenient and, I venture to think, unavoidable, it has not tended to lighten my own task.

I propose to attempt to state in the first instance and as a preliminary to my decision on the question of construction such part only of the facts proved before me as is, in view of the statement of the law which I have quoted above, properly to be taken into account by the Court on the question of construction.

The Council and the Corporation are the water authorities and the suppliers of water to consumers in their respective areas. On May 6, 1912, when the document which I have to construe was executed, the Council were entitled, under two agreements of 1903 and 1905, to draw water from Rombalds Moor through certain defined culverts for a period which, as to part of the water, was to continue until 1943 and, as to the other part of the water, was to continue until 1945, at annual rentals of 250*l.* and 290*l.* respectively, making a total of 540*l.* per annum. The land from which this water was drawn had been acquired by the Corporation in the year 1910. There was before Parliament a bill promoted by the Council, by which the Council sought power to acquire from the Corporation compulsorily, at the price which the Corporation had paid, the land from which the water was being drawn. The Corporation had petitioned against this bill. Negotiations had been in progress for some time between the Council and the Corporation with a view to adjusting these differences. The quantity of water which the Council were obtaining in respect of their payment of 540*l.* per annum was believed by the Council and the Corporation to be about 450,000 gallons a day.

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(1) [1935] A. C. 96, 142, 143. (Heard on June 15, 25, 26, and Nov. 23, 1934.)

In this state of facts the document of May 6, 1912, was executed by the Council and the Corporation under their respective seals. This is the document which I have to construe. [His Lordship, after referring seriatim to each of the clauses of the document of May 6, 1912, and stating his views of its effect, continued as follows]: I can see no escape from the conclusion that the whole document shows that the words in the clause which I have to construe are used, as regards pounds, as meaning pounds per annum and, as regards gallons, as meaning gallons per diem. Considering the whole context of the document, I cannot otherwise satisfactorily harmonize all its parts.

This being my view of the construction which I am bound to place upon this document, I must grant the plaintiffs in substance the declaration they ask; but, in view of the presence in the clause of the words "subject to measurement," I propose to frame the actual declaration as follows: "A declaration that, on the true construction of the agreement dated May 6, 1912, in the pleadings mentioned, the figure of 540*l.* is to be understood as a figure of 540*l.* per annum and the figure of 450,000 gallons is to be understood as a figure of 450,000 gallons per diem."

In the view I thus take of the true construction of the document, the question of rectification does not arise; but, as my view may turn out not to be correct, it is my duty to state my conclusions of fact on the evidence which is admissible on the question of rectification; and, in view of the very elaborate and careful argument presented to me on the legal question as to the limits of the Court's powers to rectify, I think it is convenient that I should summarize quite shortly the points made on either side and my view upon those points.

I am glad to say that the additional facts material to the question of rectification turned out not to be substantially in dispute. They were as follows. I have mentioned the bill promoted by the Council and the petition presented against the bill. With a view to a settlement, representatives of the Council and the Corporation met and there were lengthy discussions. Ultimately, on March 25, 1912, Sir James Roberts, a member of the Council, met Alderman Gadie and Alderman Land, members of the Corporation, and they came to terms in outline which Sir James Roberts embodied in a letter which contains the following: "Should Shipley require further water from Rombalds Moor, the same may be obtained on the same basis of price as that contained in the two leases from Ferrand of 1903 and 1905, under which Shipley obtains 450,000 gallons per day for a payment of 540*l.* per annum." These terms were submitted to the negotiating committees representing the two parties and various meetings were held. There is no trace of any suggestion that water should be paid for otherwise than—to use language used in a minute of a joint meeting on April 2, 1912—at the same payment ratio as exists for the water taken under the agreements of 1903 and 1905.

Ultimately, on April 4, 1912, a document headed "Water rights: provisional agreement" was drawn up and signed on behalf of the Council by its clerk and Sir James Roberts and another gentleman, and on behalf of the Corporation by the Town Clerk and a member of the Corporation.

I have had evidence, taken on commission, from Sir James Roberts. Alderman Gadie, who took a prominent part on the Corporation side in the negotiations, was in Court and was content not to go into the box.

The operative part of the document of April 4 is in precisely the same terms as the document which I have construed, save for the immaterial circumstance that an arbitration clause is added to the latter document. It is perfectly clear on the evidence and, indeed, the contrary was not seriously suggested before me, that all the parties concerned in drawing up the document of April 4, 1912, understood and intended that document to provide for payment for water at a rate corresponding to an annual payment of 540*l*. for a daily yield of 450,000 gallons; in other words, every one intended the crucial clause in the document of April 4, 1912, to express precisely what I have held the same clause in the document of May 6, 1912, to mean.

It is plain, however—and nobody contends or ever has contended the contrary—that the document of April 4 was not, and was not understood by any one to be, a final and enforceable agreement. Every one knew that it was essential that any document, in order to be binding, should be under the seals of the Council and the Corporation.

The solicitors on each side proceeded to prepare the document in the form of a lease which was to be the binding and effectual document. Difficulties arose as to the form of this document and evidence was given before me as to the drafts which passed between the solicitors; but in each and every of those drafts it is clear that the 540*l*. is an annual sum and the 450,000 gallons is a figure of daily yield, and it is thus carefully expressed.

Time, however, was running on and the bill was about to come on in Committee. The Council would not withdraw the clauses affecting the Corporation until the Corporation had bound itself to the provisionally settled terms. Despairing of settling the final lease in time, the parties added an arbitration clause to the document of April 4, and thus came into being the document of May 6, 1912, which was duly sealed by the Council and the Corporation.

A binding document having thus come into being, the obnoxious clauses were withdrawn from the bill. The document of May 6, 1912, was executed simply in order to make binding the precise terms which had been provisionally embodied in the document of April 4.

On the facts I have stated I can see no escape from the conclusion that either the 540*l*. is to be construed as an annual

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figure and the 450,000 gallons is to be understood as a figure of daily yield—as, indeed, I think and propose to declare—or that, if that is not so, the form of the deed is defective in that it did not specifically state what the parties intended and that the defects will be made good and the form brought into accord with the intention by inserting the words " per annum " immediately after the " 540*l*." and the words " per diem " immediately after the words " 450,000 gallons," the fact that the form of the instrument is thus defective and that the mistake was mutual appearing without any possible doubt from the circumstances in evidence before the Court.

The jurisdiction of the Court in these circumstances to rectify the defective document is asserted in plain terms by Lord Hardwicke L.C. in the year 1749 in *Henkle* v. *Royal Exchange Assurance Co.* (1) and recognized by the same great authority in 1750 in *Baker* v. *Paine.* (2) In *Shelburne* v. *Inchiquin* (3) in the year 1784, Lord Thurlow L.C. was prepared to rectify an instrument on evidence that the words taken down in writing were contrary to the concurrent intention of all parties, though he required strong irrefragable evidence, and in the year 1801 Lord Eldon L.C. in *Townshend* (*Marquis*) v. *Stangroom* (4) recognized this statement as embodying the rule of the Court. Half a century later, in *Rooke* v. *Lord Kensington* (5), Wood V.-C. thought it clear that the Court could rectify a settlement where the intention of the parties did not coincide with the terms of the deed. In the year 1859 Lord Chelmsford L.C. in discussing this head of equitable jurisdiction regards the mutual concurrent intention of the parties at the time of execution as being that to which the deed must be made to conform: *Fowler* v. *Fowler.* (6) In the year 1862 Turner L.J. in *Bentley* v. *Mackay* (7) seems to treat the concurrent intention of the parties at the time of execution as the contract to which the instrument by rectification is to be made to conform; and in the same year Sir John Romilly M.R. (*Bradford* (*Earl*) v. *Romney* (*Earl*) (1)) uses language to much the same effect. In other cases, such as *Lackersteen* v. *Lackersteen* (2) ; *Hanley* v. *Pearson* (3), Bacon V.-C.; *Johnson* v. *Bragge* (4), Cozens-Hardy J., it was to the intention of the parties at the moment of execution that the attention of the Court was directed.

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(1) 1 Ves. Sen. 317, 318.

(2) Ibid. 456.

(3) 1 Bro. C. C. 338, 341.

(4) (1801) 6 Ves. 328, 334.

(5) 2 K. & J. 753, 763, 764.

(6) 4 De G. & J. 250, 265.

(7) 4 De G. F. & J. 279, 286.

Notwithstanding these authorities, counsel for the Corporation argued, as I understood them, that the jurisdiction of the Court to rectify a document is limited to the case where it is possible to prove that before the execution of the document there was in existence a legally enforceable agreement, whether oral or written (or possibly an agreement which would be legally enforceable but for some statutory provision requiring special formalities) in terms which the document was intended to record, but failed by mutual mistake to record. They argued, and in my view correctly, that, in view of the inability, which the plaintiffs admitted, of the Council and the Corporation to bind themselves to such an agreement as that in dispute otherwise than under seal, it was impossible to predicate that there was any agreement between the Council and the Corporation except that constituted by the sealed document. They drew the conclusion (which, indeed, appears to me to be, on their premises, inevitable) that the Court could not rectify an agreement between two such bodies as the Council and the Corporation even on the clearest evidence that the document, even by the merest copying slip, failed to record what all parties intended it to record. Even as regards such bodies as the Council and the Corporation this would seem to be rather startling; but it will be observed—and counsel for the defendants did not shrink from accepting this conclusion—that in the case of ordinary individuals, an instrument, on this theory, cannot be rectified except on proof of a previously existing legally binding document, proof which, in the case of most written contracts (though not, of course, as a rule in the case of conveyances) is not usually available, simply because negotiation has not, even

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(1) 30 Beav. 431, 438.
(2) 30 L. J. (Ch.) 5.
(3) 13 Ch. D. 545.
(4) [1901] 1 Ch. 28.

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where intentions have been found to coincide, crystallized into contract, until the moment of executing the written contract.

It must be conceded that, whether or not it is difficult to reconcile the defendants' argument with principle and with the long and ancient line of authorities which I have summarized above, there is some justification to be found in the books for their contention. It is to be remembered that many, perhaps even most, rectification cases deal with the reforming of a final instrument, such as a conveyance or a settlement, so as to accord with a previous instrument, such as a contract for sale or articles for a settlement, and that the high standard of mutual mistake which the Court requires—Thurlow L.C. in *Shelburne* v. *Inchiquin* (1) even used the phrase "irrefragable"—makes cases where mutual mistake can be proved, in the absence of any previous written instrument, very rare, and that where, in the absence of any previous instrument, mutual mistake can be clearly proved, the matter may very often be put right out of Court, without litigation.

It would thus not be surprising to find that, in cases where the exact point was not material, language may be used in general terms, in relation to cases of rectification by reference to a previous written instrument, which is not strictly accurate in reference to a case where rectification proceeds on proof of mutual mistake in recording the concurrent intention of the parties at the moment of execution of the instrument which it is sought to rectify.

In *Mackenzie* v. *Coulson* (2) in the year 1869, James V.-C. was asked to rectify a policy on the ground of mutual mistake. The defendants said that there was no mistake at all; that they signed the policy as containing the true agreement and that it in fact expressed the only agreement into which they were minded to enter. It was sought to prove the contrary by producing the slip. Of course, had the slip been a contract and had the policy failed to conform to the contract as expressed in the slip and had the plaintiff satisfied the Court that the policy was intended merely to put into form the contract concluded by the slip, they might well have succeeded. The Vice-Chancellor, however, took the view that he was bound to hold that the slip was not a contract or evidence of a contract. The plaintiff necessarily failed in the action. The Vice-Chancellor, however, used these words: "Courts of Equity do not rectify contracts; they may and do rectify instruments purporting to have been made in pursuance of the terms of contracts. But it is always necessary for a plaintiff to show that there was an actual concluded contract antecedent to the instrument which is sought to be rectified; and that such contract is inaccurately represented in the instrument." The language of the Vice-Chancellor was, if I may respectfully say so, perfectly accurate in reference to the cases which he obviously had in mind, where mutual mistake is sought to be established by reference to the terms of a previous contract. His words, however, apart from their context, have, there is no doubt, found their way into works of no little authority in such a form as to suggest, as, indeed, the defendants' counsel argued, that the jurisdiction of the Court cannot be exercised, even in cases of clear mutual mistake, in the attempt to embody in the instrument the concurrent intention of the parties existing at the moment of the execution of the instrument, unless a previously existing contract can be proved.

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(1) 1 Bro. C. C. 338, 341.

(2) L. R. 8 Eq. 368, 375.

It is sufficient for me to say that, had it been necessary for me to decide the point, I should not have felt justified in accepting this interpretation of the Vice-Chancellor's language as correct.

The passage in James V.-C.'s judgment to which I have referred was cited by Sir Herbert Cozens-Hardy M.R. in the course of counsel's argument in *Schofield* v. *W. C. Clough & Co.* (1), but I can find nothing in that case to help me with the problem before me.

An echo (as I venture to think it) of the same language is to be traced in the language used by Lord Birkenhead in delivering the judgment of the Judicial Committee of the Privy Council in *United States of America* v. *Motor Trucks,*

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(1) [1913] 2 K. B. 103, 105.

Ld. (1), but the matter under consideration there was quite a different question from that which is at issue in this case.

If the matter had rested there, it may be that the defendants' argument would never have been put forward, but there are two cases in which the exact point arose which is in issue here—namely, whether a document sealed by a corporation, which can bind itself only by seal, can be rectified. In each case an actual decision was unnecessary, but in each case the learned judge (Younger J. in the one case and Romer J. in the other) expressed by way of dictum a provisional view which certainly supports the defendants' argument, but in neither case were the early authorities discussed. Those cases are *Faraday* v. *Tamworth Union* (2) and *Higgins* (*W.*), *Ld.* v. *Mayor of Northampton.* (3) In each case the Court found that there was no mutual mistake, but in each case the judge intimated that he would have felt a difficulty in rectifying the document, because that would amount to binding the corporate body to a document which requires a seal, but which the body have in fact never sealed. Not only were the earlier cases not cited, but attention was not in either case drawn to the decision of the Court of Appeal in *Hall-Dare* v. *Hall-Dare* (4), which seems to show that a deed rectified by the Court so as to conform to the true intention of the executing party at the moment of execution must be taken to be his deed and to have been (at all events, for any purpose relevant to this case) his deed in the rectified form as from the date of execution: see also *Meeking* v. *Meeking.* (5)

Had it been necessary for me to decide the point, I should have felt some difficulty in following the dicta in these two cases, and I should have felt bound to hold that the proof in the present case that the concurrent intention of the parties was, at the moment of execution, to contract on the footing of the 540*l.* being a sum per annum and the 450,000 gallons a yield per diem would have made it necessary (but for my construing the instrument as I have construed it) to rectify

(1) [1924] A. C. 196, 200.
(2) 86 L. J. (Ch). 436.
(3) [1927] 1 Ch. 128.
(4) 31 Ch. D. 251.
(5) [1917] 1 Ch. 77.

the instrument so as to accord with that concurrent intention, notwithstanding that the parties can be bound only by their respective seals.

It is only necessary for me to add that the defendants pleaded laches as a defence to the claim for rectification. It appeared that the Council were aware in October, 1923, that the Corporation were prepared to contend that the agreement placed the figure for water at 24*s.* per thousand gallons, construing the 540*l.* as a gross sum to be paid for every 450,000 gallons supplied, a figure which the Corporation themselves at the same time stated to be excessive; but the matter was not then pursued. It was, indeed, suggested that the Corporation had altered their position in the belief that the plaintiffs accepted this view of the construction of the document as correct; but this suggestion was not supported by the evidence and was not persisted in. It did not appear that the delay in bringing the matter to an issue had in any way prejudiced the position of the defendants or resulted in the disappearance of relevant evidence.

I should not have felt able to give any effect to the plea of laches. (1)

Solicitors for plaintiffs: *Lees & Co.*

Solicitors for defendants: *Torr & Co., for N. L. Fleming, Town Clerk, Bradford.*

(1) From this decision the defendants appealed, and the appeal was heard on February 12, 13, 14, 1936. The Court of Appeal affirmed the decision of Clauson J. on the question of construction and the question of rectification did not therefore arise.

H. C. H.

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1936
Feb. 3, 4.

BURKE AND MARGOT BURKE, LIMITED *v.* SPICERS DRESS DESIGNS.

[1935. B. 4450.]

Copyright—Infringement—Construction—" Artistic work "—Sketch by first plaintiff of frock on lady—Frock made by plaintiff company from sketch with consent of sketcher—Frock made by defendants not a reproduction of sketch—Original " work of artistic craftsmanship "—Craftsman not author of the artistic element—No Copyright in frock made by plaintiff company—Copyright Act, 1911 (1 & 2 *Geo.* 5, *c.* 46), *s.* 1, *sub-ss.* 1, 2 ; *s.* 35.

The plaintiff, B., having made a sketch of a red frock worn upon a lady, the plaintiff company, with the consent of B., made a frock which followed the lines of the frock which the lady was shown wearing in the sketch. It was the practice of the plaintiff company not to sell a frock of the same design to any customer other than the particular customer for whom it was designed.

The defendants, without the consent of the plaintiffs or either of them, made a frock which was precisely the same as the plaintiff company's frock and made and offered for sale and sold frocks which were substantially reproductions of the frock made by the plaintiff company and threatened to continue so to do :—

Held, first, that the frock made by the defendants (whether spread out or held up to view) was not a reproduction of B.'s sketch within the meaning of s. 1, sub-s. 2, of the Copyright Act, 1911, and that, consequently, B.'s copyright in the sketch was not infringed ; secondly, that the frock copied by the plaintiff company from the sketch was not an original " work of artistic craftsmanship " within the meaning of that definition of " artistic work " contained in s. 35 of the Copyright Act, 1911, as the plaintiff company were not the originators of the artistic element in the work.

Whether, if B. herself made the frock from her own design, she would be entitled to copyright therein *quaere.*

WITNESS ACTION.

The following facts were not disputed : Mrs. Marjorie L. Burke was the author of and was at all material times the owner of the copyright in an artistic work, namely, a sketch depicting a frock worn upon a lady. The plaintiff company made a lady's frock by copying the sketch with the consent of Mrs. Burke, the sketcher ; and in order to produce the frock from the sketch the plaintiff company required to use and did

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use considerable skill and knowledge in the dress-making art. The defendants, without the consent of the plaintiffs or either of them, copied the frock which the plaintiff company had so made, offered for sale and sold frocks which were substantial reproductions thereof and threatened to continue to do so.

In this action Mrs. Burke and Margot Burke, Ld. (of which company Mrs. Burke was the sole director), alleged infringement by the defendants of (*a*) Mrs. Burke's copyright in her sketch, and (*b*) the copyright of the plaintiff company in the frock; and they claimed an injunction to restrain the defendants from infringing the copyright which Mrs. Burke claimed in the sketch and the copyright which the plaintiff company alleged subsisted in the frock made from the sketch, the truth of which allegation was denied by the defendants.

Mrs. Burke was called as a witness and her evidence is fully stated by Clauson J. in his judgment.

The Hon. S. O. Henn Collins K.C. and K. E. Shelley for the plaintiffs. First, the defendants have made a frock which is a reproduction of Mrs. Burke's sketch and have infringed her copyright therein. It is a "reproduction" within s. 1 sub. s. 2 of the Copyright Act, 1911. (1) The sketch is reproduced by the frock in a material form. In passing that Act the legislature intended to include in the Act the embodiment of an idea whatever might be the medium in which it was expressed: per Coleridge J. in *Bradbury, Agnew & Co.* v. *Day* (2); a decision which in effect made a living picture a possible reproduction of a picture and an infringement of copyright in the picture. Even if the sketch be registrable as a design, it is nevertheless the subject-matter of copyright, The plaintiffs have no intention of multiplying the design of the frock industrially. The effect of s. 22 of the Act is to make the Act apply to all designs not used or intended to be used for industrial purposes: per Russell J. in *Ware* v. *Anglo-Italian Commercial Agency, Ld.* (No. 2). (1) As one who translates an original work into another language may produce another original work, so it may be fairly said the defendants translated Mrs. Burke's sketch into a frock. Secondly: the plaintiff company's copyright in their frock has been infringed by the defendants' frock. The plaintiff company's frock is "a work of artistic craftsmanship" within the definition of "artistic work" in s. 35 of the Copyright Act, 1911. Whether the plaintiff company derived the artistic element in their frock from Mrs. Burke it is immaterial to consider; the result was "a work of artistic craftsmanship" within s. 35 of the Act. The frock, which is the result of the plaintiff company's craftsmanship, in itself appeals to the æsthetic emotions; just as a violin may be a work of artistic craftsmanship, although its main object is to produce music; or, a garden-gate may be ornamental as well as useful. In short, the craftsmen in producing the frock may be said to have made their craft a fine art. Further, the frock was the "original" work of the plaintiff company: it was the original expression by them of the idea of producing a frock upon the lines depicted in the sketch: and that expression is an original one, even though it be not in an original or novel form, provided it had its origin in the mind of its author: see per Peterson J. in *University of London Press, Ld.* v. *University Tutorial Press, Ld.* (2); and per Earl of Halsbury L.C. in *Walter* v. *Lane.* (3)

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(1) Sect. 1, sub-s. 2: "For the purposes of this Act, 'copyright' means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever." And s. 2, sub-s. 1: "Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright."

(2) (1916) 32 Times L. R. 349.

E. J. Macgillivray and *P. J. Stuart Bevan* for the defendants. In order to establish copyright whether in the sketch or in the plaintiff company's frock made therefrom, it is necessary for the plaintiffs to show that they are subject-matters of copyright, falling within the four corners of the consolidating Act, namely, the Copyright Act, 1911. The only heading under which either can be suggested to fall is "artistic work"

(1) Macg. C. C. 1917–1923, 371.

(2) [1916] 2 Ch. 601, 608.

(3) [1900] A. C. 539.

mentioned in s. 1, sub-s. 1, of the Act and more amply defined in s. 35 of the same Act. First, as to the plaintiffs' claim to copyright in the sketch: "Artistic work" includes paintings and drawings; prima facie, the sketch is included: but the sketch does not possess the same artistic elements as a painting or a drawing: it is, at least, doubtful whether it is an original artistic work in which copyright exists. In the circumstances of this case, it is but a step in the creation of a frock, the frock being the original work; if, indeed, original it can be said to be. To constitute infringement of copyright, the plaintiffs must show that the defendants' frock is a "reproduction" of the sketch. It is not such a reproduction and there is no infringement by the defendants. The sketch is but an abstract mental conception or suggestion or idea of a shape or of a picture or of some arrangement which can be applied to an article (in this case the plaintiff company's frock) by some manual, mechanical, or chemical means: see *Dover, Ld.* v. *Nürnberger Celluloidwaren Fabrik Gebrüder Wolff.* (1) If the sketch were registered as a "design," the defendants' frock might be an infringement of the design; but the defendants have not infringed the plaintiffs' copyright, if any, in the sketch, because they have not reproduced the sketch. The Act is not aimed against reproducing an original drawing or sketch in the sense of imitating or representing the same by means totally different from drawing or sketching, that is (as in this case) by the production of a frock: *Hanfstaengl* v. *Empire Palace.* (2) The frock is in a state of flux and varies according to the point of view from which it is viewed; while the sketch of the frock cannot vary.

Secondly, as to the plaintiffs' claim to copyright in the frock produced by the plaintiff company: the frock is not a "work of artistic craftsmanship" within the definition of "artistic work" contained in s. 35 of the Act. The art and the craft must originate from the same mind, in order to make a work a work of artistic craftsmanship. The author must combine in himself both the art and the craft; when the art and the craft are divorced, the work is not an original work. Here,

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(1) [1910] 2 Ch. 25, 28, 29.

(2) [1894] 2 Ch. 1, 5.

Mrs. Burke was the designer and the plaintiff company the craftsmen: the company, no doubt, had to use skill in producing the frock on the lines of the design, but the artistic element they borrowed from Mrs. Burke. It is the artist whom the Act sets out to protect, not the craftsman. When the art and the craft originate from the same mind, the work may then be an original work of artistic craftsmanship. The legislature has conferred copyright expressly in respect of "architectural works of art and engravings and photographs"; see s. 35 of the Act. It is fair to assume that if the legislature intended to confer copyright in respect of dresses, it would have provided accordingly. Moreover, the terms of s. 2, sub-s. 1 (iii) are inapplicable to such an article as a dress.

CLAUSON J. In this action Mrs. Burke and a company named Margot Burke, Ld., of which Mrs. Burke is the sole director, claim to restrain the defendants from infringing the copyright of Mrs. Burke in a certain sketch of a lady wearing a red dress marked "M.L.B.1," and the copyright of the plaintiff company in a certain dress which is marked "M.L.B.2."

Mrs. Burke, in evidence, stated that the company are the makers of ladies' frocks, that she herself made the sketch "M.L.B.1" and that the plaintiff company by their workwomen have made a frock which followed the lines of the dress which the lady is shown wearing in the sketch "M.L.B.1." The frock so made was put upon a lady of the appropriate figure and colouring who exhibited herself to me in court wearing it, and I am satisfied that Mrs. Burke was correct in saying that the frock "M.L.B.2" which the young lady was wearing followed the lines of the sketch "M.L.B.1." It was a mere accident that I saw the frock on the lady.

Whether I should have found it so easy to accept Mrs. Burke's evidence if I had not seen the frock worn by the lady, but the frock had merely been held up in court, I do not know. Mrs. Burke told me that the general practice of her company is to have a sketch made which is subsequently embodied in a frock, and only one example of such a frock is intended to be sold. The relevance of that evidence will become better understood on reference to s. 22 of the Copyright Act, 1911, and to the provisions of the Patents and Designs Act, 1907, and the rules under that Act. It was admitted that the defendants had made a frock which was precisely the same as " M.L.B.2," though I did not actually see the frock so made. Mrs. Burke's evidence was that neither she nor her company had ever consented to a copying of either " M.L.B.1," the sketch, or " M.L.B.2," the frock. She went on to tell me that the task of making the frock from the sketch involved making patterns from the sketch. " The sketch," she said, " looks very nice, but does not always go on the human figure ; we have to make patterns or ' toiles ' ; the frock is made from the sketch for a particular customer ; the object of the pattern is to insure the frock shall fit the customer ; you do not quite know what the result will be until you have made the pattern. The frock is made for a particular customer, the pattern is made to fit on ; it is the usual practice to make a pattern. The workroom cuts out material from the pattern ; that involves skill ; when the material is cut out, it has to be fitted on the figure and afterwards sewn up ; those operations require skill." In cross-examination she said : " The dress is made for one customer ; the same dress would not suit every customer. This dress would not suit every customer. Customers like to have their dresses made for them alone and no one else : I have to consider the individuality of my customers. Before I set out to make the design, patterns are made with material ; in making the pattern it is attempted to reproduce the design ; the dressmaker does not make other drawings ; the design of the dress is embodied in my sketch." Then in re-examination she said that she sometimes made a model for a particular mannequin to show. " If," she said, " the customer is a different size to the mannequin we should make allowance ; we should have to do that quite often." In answer to a question of mine the lady said : " We should not sell a frock of the same design to any other customer." That was the whole of the evidence.

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1936
Burke and Margot Burke, Ld. v. Spicers Dress Designs.

I will first deal with Mrs. Burke's claim for an injunction to restrain the defendants from infringing her copyright on the footing that the dress which the defendants have made and which is admittedly precisely the same as "M.L.B.2," infringes Mrs. Burke's copyright in her sketch "M.L.B.1." The case for Mrs. Burke is put in this way. It is said, referring to the wording of the Copyright Act, 1911, that the defendants by making the dress which they have made have reproduced "M.L.B.1," the plaintiff's sketch, or a substantial part thereof in a material form and accordingly have infringed the Act. The sketch "M.L.B.1" is a sketch of a lady of a particularly slim figure dressed in a red frock with flounces, and so forth, arranged in a particular way. If somebody had posed—a lady of similar type in a similar frock, and attitude with a view-point to the spectator corresponding to "M.L.B.1"—it may be that that would be an infringement which Mrs. Burke would be entitled to restrain. I say "it may be," because that may well be covered by the decision of Coleridge J. in the case of *Bradbury, Agnew & Co.* v. *Day.* (1) That case would be binding on me; but it is not that, or anything like that, of which Mrs. Burke complains. She complains that the defendants have brought into being a frock which no doubt when placed in a particular position upon a lady of a particular figure might be used to produce a living picture of "M.L.B.1," but when I look at the frock, qua frock, either spread out on a table or held up to my view, it seems quite impossible for me to hold that that frock, qua frock, is a reproduction of the sketch "M.L.B.1." It is not like it at all. It is on the word "reproduction" that Mrs. Burke has based her case. The mere fact that the general design of the frock may have been derived from what the dressmaker saw in "M.L.B.1" does not seem to me to assist the case. What I have to consider is whether the frock reproduces "M.L.B.1," which is a sketch of a young lady wearing a frock seen from a particular view-point. The answer seems to me to be that it does not. Accordingly, in my view, Mrs. Burke's claim fails.

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(1) 32 Times L. R. 349.

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1936
BURKE AND MARGOT BURKE, LD. v. SPICERS DRESS DESIGNS.

The fact that she has prepared a design which might possibly be registered under the Patents and Designs Act, 1907, is a different matter with which I have not to deal. When the design is registered under that Act, it may be the lady will have some right to protection under that Act, but with that I am not concerned in this action.

The claim of the company, Margot Burke Ld., is rather different. They claim that they have a copyright in the frock " M.L.B.2 " and that the frock has been reproduced, as in fact it has been, by the defendants, and that, in consequence, they are entitled to restrain the defendants from infringing that copyright, by making the frock which the defendants have admittedly made and which is admittedly indistinguishable from " M.L.B.2." The manner in which they claim copyright in this frock " M.L.B.2 " is this. They say that the frock, having been made by their workwomen, is a frock of which they are the authors for copyright purposes. They say that in consequence they have the sole right to reproduce this work—namely, the frock—it being an original artistic work. They point to the definition of " artistic work " and they say that " artistic work " includes a work of " artistic craftsmanship " and they claim that " M.L.B.2 " is an original work of artistic craftsmanship and that they are therefore under the Copyright Act entitled to prevent the defendants from reproducing that original work of artistic craftsmanship. The first difficulty in their way is that all that their workwomen have done is to do certain acts of craftsmanship and thus produce a work of craftsmanship. It is said that, having regard to the beauty of this frock when completed, it is not only a work of craftsmanship but a work of artistic craftsmanship. For the moment, though I am not satisfied that that is correct, I will assume that it is. But where did the artistic element which has become connected with this work of craftsmanship originate? It certainly did not originate in the workpeople. All they did was by purely mechanical processes to produce the article; they are craftswomen, but they were not " artistic " craftswomen; they borrowed the artistic qualities of the article from the inspiration of Mrs.

Burke in her sketch and accordingly, although I can well understand that it might be said that the frock was an original work of craftsmanship, the craftsmanship being original, it is not, in my view, an original work of artistic craftsmanship, because the artistic element did not originate in those who made the work. It is not original in so far as it is artistic; in so far as it is not artistic it is not protected by the Act. On that ground I cannot hold that the frock "M.L.B.2" is an original work of artistic craftsmanship and I must therefore hold that the plaintiff company has not copyright in the frock "M.L.B.2". I can conceive it possible that Mrs. Burke might design a frock and make it all herself, and if she did that I can well understand she might be the author of an original work of artistic craftsmanship, but that is not what has happened in this case. I do not want it to be assumed that, even so, I should feel able to hold that a lady who designed a frock and made it all herself was necessarily entitled to copyright. The point is not one which it is necessary for me to decide. It must, however, be borne in mind that the meaning of the term "artistic" as indicated in the Oxford English Dictionary, is that which pertains to an artist. An artist is defined in the same dictionary as: "One who cultivates one of the fine arts in which the object is mainly to gratify the æsthetic emotions by perfection of execution whether in creation or representation." Does a designer who herself designs and makes a frock cultivate one of the fine arts in which the object is mainly to gratify the æsthetic emotions by perfection of execution whether in creation or representation? A possible view is that what she does is merely to bring into being a garment as a mere article of commerce. If that is the right view there may be a difficulty in holding that even a lady who designs and executes a beautiful frock is necessarily the author of an original work of artistic craftsmanship. The frock when one looks at it, qua frock, as it might be held up in court, goes a very little way towards gratifying the æsthetic emotions. It is quite a different matter when the frock is placed upon a lady of the figure and colouring which it is designed to suit, then the frock in that connection may help to gratify the æsthetic emotions. The question whether a frock per se is the subject of copyright under the Act is one that can be determined only by forming a judgment upon the problem which I have thus indicated, but which in the present case it is not my duty to solve.

The action fails and must be dismissed with costs.

Solicitors: *Arthur Benjamin & Cohen; Church, Rackham & Co.*

H. C. H.

BISHOP *v.* DEAKIN.

[1935. B. 3559.]

CLAUSON J.
1936
Feb. 12, 18.

Local Government—Disqualification for election or being a member of a Local Authority—Conviction and imprisonment within five years before election or since election—Construction "Reddendo singula singulis"—Period of limitation for taking proceedings against person for acting as a member—Power of High Court to make declaration—Local Government Act, 1933 (23 & 24 *Geo.* 5, *c.* 51), *s.* 59, *sub-s.* 1 (*e*); *s.* 84.

Sect. 59, sub-s. 1, of the Local Government Act, 1933, enacts: "A person shall be disqualified for being elected or being a member of a local authority if he" (inter alia) "(*e*) has within five years before the day of election or since his election been convicted in the United Kingdom . . . . of any offence and ordered to be imprisoned for a period of not less than three months, without the option of a fine."

By s. 84, sub-s. 1, of the same Act proceedings may be instituted in the High Court against any person acting as a member of a local authority on the ground of his being disqualified from so acting: "Provided that proceedings under this section on the ground of a person acting as aforesaid shall not be instituted after the expiration of six months from the date on which he so acted."

On July 6, 1932, the defendant was convicted of perjury and sentenced to be imprisoned for a period exceeding three months without the option of a fine.

In an action under s. 84 aforesaid for a declaration that the defendant, who was acting as a duly elected member of a local authority, was disqualified from so acting on the ground of her conviction and sentence within five years before her election :—

Held : first, that, upon the proper construction of s. 59 of the Local Government Act, 1933, the defendant, notwithstanding that she was, on the ground of that conviction and sentence, disqualified for election, was not thereby disqualified from acting as a member of the local authority to which she had been duly elected ; secondly, that upon the true construction of the proviso to s. 84, sub-s. 1, of that Act, the "date on which he so acted" meant the earliest date after election on which he so acted and that the period of limitation began to run from that date ; and that, accordingly, the defendant having first acted as a member more than six months before the issue of the writ, the action did not lie.

ACTION.

On July 6, 1932, the defendant was convicted of an offence and sentenced to be imprisoned for a period exceeding three months without the option of a fine.

On November 1, 1934, the defendant, notwithstanding her previous conviction and sentence, was elected to the office of councillor of the borough of Newcastle-under-Lyme, and it was admitted that immediately after the election she acted in her office of councillor and on several other occasions more than six months before the issue of the writ and on several other occasions within six months of the issue of the writ.

By the writ in this action, issued on September 19, 1935, the plaintiff, a local government elector of the said borough, claimed a declaration under s. 84 aforesaid that the defendant, who was acting as an elected councillor of the said borough, was disqualified from so acting and that her office as such councillor was vacant.

For the purposes of this report the material sections of the Local Government Act, 1933, are sufficiently stated or referred to in the headnote.

E. J. Rimmer for the plaintiff. The validity of the defendant's election as councillor is not challenged. Under the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), such an election could only have been called in question on an election petition. If the disqualification, although arising before election, was one which disqualified from holding the office as well as from being elected, proceedings could be taken (i.e., information in the nature of "quo warranto") to oust the disqualified person from his office, after the expiry of the period available for an election petition: see *Rex* v. *Beer* (1) which showed that proceedings by way of "quo warranto" grounded on disqualification before election were available, after election, as regards holding office as distinct from election to office. Upon the proper construction of s. 59 of the Local Government Act, 1933, the defendant's conviction on July 6, 1932, which was a ground for disqualifying her for election, further disqualified her for acting as a member of the council. The words of the section are "or 'being' a member," not "or 'becoming' a member." Sect. 84 of the Act of 1933 abolishes the old procedure of "quo warranto" and substitutes for it a new procedure. There is nothing in that section which restricts the new procedure to a case where the disqualification is grounded upon a conviction incurred after election. Any other construction of s. 84 would have unreasonable results: a candidate with a thoroughly bad record might stand for election and after election could only be turned out of office by the expensive proceedings of an election petition; nor could he be fined after acting in his office: proceedings by way of an election petition do not provide for fining a member; s. 84 is the only section which provides for fining members. It is unreasonable to attribute to the Legislature the intention of forcing the adoption of the expensive procedure of an election petition in every case and to condone every illegal election unless the procedure of an election petition is resorted to. If s. 84 was intended not to apply to persons being disqualified after election, the Legislature would have so provided. There is nothing in the Act of 1933 to prevent the plaintiff from claiming, on the ground of the conviction before the election, that the defendant is disqualified for acting as councillor and that notwithstanding the validity of her election.

(1) [1903] 2 K. B. 693.

W. Dudley Collard for the defendant. Upon the proper construction of s. 59 of the Act of 1933 (which is a consolidating statute) and applying the rule of construction "reddendo singula singulis," it is reasonably plain that the section contemplates two grounds of disqualification—namely, conviction before election and conviction since election. Accordingly, the conviction of the defendant before the election is not a ground of disqualification for acting in her office of councillor. Further, the plaintiff's action was out of time as, under the proviso to s. 84, sub-s. 1, the period of limitation began to run from the earliest act (which was in November, 1934) of the defendant as an elected member of the council.

Cur. adv. vult.

1936. Feb. 18. CLAUSON J. delivered a considered judgment. The object of this action is to obtain a declaration that the defendant, who is acting as an elected councillor of the Borough Council of Newcastle-under-Lyme, is now disqualified from so acting, and that her office as such councillor is vacant.

On July 6, 1932, the defendant was convicted of an offence and ordered to be imprisoned for a period exceeding three months, without the option of a fine. She has long since served that sentence; but a period of five years has not yet elapsed from the date of that conviction.

On November 1, 1934, the defendant was elected to the office of councillor. There is no doubt that when so elected she was by law, by reason of s. 59, sub-s. 1 (*e*), of the Local Government Act, 1933, disqualified from election by reason of the conviction having taken place within five years before the day of election; and there is no doubt that if within the due period prescribed by law an election petition had been presented against her on this ground her office would have been declared vacant. However, that step was not taken; and it is too late to question the validity of her election (see s. 71 of the same Act).

After election she acted as a councillor. The particular dates on which she so acted which are stated in the statement of claim were all within six months of the issue of the writ in this action; but it was admitted before me by counsel that she began to act as councillor immediately after election, on November 1, 1934; and, accordingly, that she acted as a councillor on one or more dates more than six months prior to the issue of the writ.

It is said that she is in these circumstances, by reason of s. 59, sub-s. 1 (*e*), of the Local Government Act, 1933, disqualified from being a councillor; and the case is put in this way. It is said that, on the true construction of that section, any person who within five years before the day of his election has suffered such a conviction as was suffered in this case, is not only disqualified from being elected a councillor, but if in fact he has been elected a councillor, is disqualified from acting as a councillor.

The relevant words in the section are as follows: "A person shall be disqualified for being elected or being a member of a local authority if he has, within five years before the day of election, or since his election, been convicted of any offence, and ordered to be imprisoned for a period of not less than three months, without the option of a fine."

The section provides for two matters: first, what is to be the disqualification for election; and, secondly, what is to be the disqualification for being a member after election; and it provides for two disqualifications: first, conviction within five years before the day of election; and, secondly, conviction since election. It is obvious that the second disqualification mentioned does not fit the first case mentioned, namely, that of election, but does fit the second case, and the second case only. It is also obvious that the first disqualification mentioned fits the first case, and it does not seem at all apt to fit the second case. Indeed, if applied to the second case the strangest results may follow. If the section is to be read as providing that a person is disqualified from being a councillor if he was convicted within five years before his election, it may well be that he is so disqualified when he acts as a councillor at a date later than five years from the date of the conviction. In that case, the effect of the disqualification operating would be that he would cease to be a councillor; but he would be eligible at once for re-election to the vacant office, the five years having expired before the new election. I cannot think that the Legislature intended such a whimsical result. All difficulty can be avoided by applying the well-known method of construction commonly known as reddendo singula singulis, and applying the first disqualification mentioned to the first case dealt with, and the second disqualification to the second case dealt with, a construction which, so far as I can see, infringes no rule of syntax or grammar. The result reached seems to be quite sensible—namely, that conviction within five years before the day of election disqualifies from election, and conviction after election disqualifies from continuance in office.

I will, however, assume that my view of the section is wrong, and that a person so elected a councillor who, after his election, acts as a councillor, is disqualified for being a councillor by reason of a conviction within five years before his election. Applying that to the present case, it would follow that when the defendant acted in November, 1934, as a councillor she was disqualified. The point then arises whether this action, which was begun more than six months after she so acted, will lie. This question turns on the true meaning of the proviso to s. 84, sub-s. 1, which enacts that proceedings under s. 84 (which is the section under which this action is launched) on the ground of a person acting as a councillor when disqualified shall not be instituted after the expiration of six months from the date on which he so acted. It was suggested that the action will lie, if within six months before the proceedings were instituted the defendant acted as councillor without qualification, notwithstanding that he first so acted more than six months before such institution.

In my view, this suggestion places a wrong construction on the section. The proviso is aimed at protecting a person who acts without qualification, if the proceeding is not brought within six months of his so acting; and the reference to the "date on which he so acted" seems to me necessarily

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1936
BISHOP v. DEAKIN.

to be a reference to the earliest date after election on which he so acts as the date at which the period of limitation begins to run.

As I am of opinion that the action fails on each of the two grounds I have mentioned, it becomes unnecessary for me to pursue several interesting questions under various sections of the relevant Acts which were raised and argued before me.

The action will be dismissed with costs.

Solicitors: *Lake & Son; W. H. Thompson.*

H. C. H.

F. W. WOOLWORTH AND COMPANY, LIMITED *v.* LAMBERT.

CLAUSON J.
1936
Feb. 27, 28; *March* 2.

[1935. F. 787.]

Landlord and Tenant—Lease of shop—Proposed alterations—Extension to adjoining premises—Covenant not to make structural alterations without lessors' consent—Undertaking to reinstate at end of term—Lessors' demand of two years' rent for consent—Damage to or diminution in value of premises—Consent to alterations not unreasonably refused—Landlord and Tenant Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *s.* 19, *sub-s.* 2.

The plaintiffs were the lessees of a shop for a term of forty-two years at a rent of 3500*l.* a year. The lease contained a covenant by the lessees not without the previous consent in writing of the lessors to make any structural alterations in or additions to the demised premises, provided that no fine or premium or increase of rent would be demanded for the lessors' approval.

The plaintiffs proposed to enlarge and reconstruct the shop by pulling down the back wall and connecting it with adjoining premises of which they held a lease from another owner, and then to erect a new shop over the combined properties, in which the main staircase, staff accommodation and lavatories would be removed from the former shop to the extension. They asked the lessors for their consent to these alterations and offered them an undertaking to reinstate the premises in their former condition before the end or sooner determination of the term, and to secure the performance of this obligation

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by an insurance policy. The lessors refused their consent to the proposed alterations except on condition of the payment by the plaintiffs to them of 7000*l.* in respect of damage to or diminution in value of the demised premises. The plaintiffs refused to pay this or any other sum, and brought an action claiming declarations that by virtue of the Landlord and Tenant Act, 1927, the lessors were not entitled unreasonably to refuse their consent to the alterations, and that if they did so refuse the plaintiffs were at liberty to proceed with the alterations without their consent, but subject to the undertaking to reinstate the premises :—

Held, that although a covenant not to make alterations which from the lessees' point of view would be improvements came within s. 19, sub-s. 2, of the Landlord and Tenant Act, 1927, the proposed alteration was not within this sub-section; for, though the proposed alterations might benefit the plaintiffs, they would not be improvements of the demised premises, which would then cease to be a shop such as the plaintiffs had covenanted to carry on and keep open, and would become merely a space forming part of a much larger shop.

Held, also, that in these circumstances and on the ground that the lessors' professional advisers had estimated the diminution which would be caused to the value of the reversion by the alterations at 7000*l.*, the lessors had not unreasonably refused their consent to the alterations.

Balls Brothers, Ld. v. *Sinclair* [1931] 2 Ch. 325 followed on the construction of the Act.

The Court has no jurisdiction to direct an inquiry as to what would be a reasonable sum for lessees to pay to lessors for diminution in value, where the lessees do not admit that any such sum is payable.

Semble, sect. 19, sub-s. 2, of the Landlord and Tenant Act, 1927, has no application to an unqualified covenant not to make any improvements; but only to covenants against making improvements without the lessors' licence or consent.

Action.

The plaintiffs, who were lessees of a shop at 18 and 20 Commercial Road, Bournemouth, under a lease from the defendants dated February 27, 1931, for a term of forty-two years at a rent of 3500*l.* a year, to be increased to 3750*l.* as from June 24, 1945, claimed a declaration that on the true construction of the lease and in the events which had happened the defendants were not entitled, by reason of the Landlord and Tenant Act, 1927, to withhold their licence or consent to the making of certain improvements and alterations in the premises, and also a declaration that the plaintiffs were entitled

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to make the proposed improvements without any further licence or consent of the defendants. The facts are fully stated in the judgment of the learned judge, and shortly in the headnote.

Fergus Morton K.C. and *S. P. J. Merlin* for the plaintiffs. The case comes within s. 19, sub-s. 2, of the Landlord and Tenant Act, 1927, and the defendants have unreasonably refused to give their licence or consent to the alterations, which we submit are clearly improvements of the demised premises. Luxmoore J. in *Balls Brothers, Ld.* v. *Sinclair* (1) held that " improvements " in that section meant improvements from the tenants' point of view. Therefore it does not matter whether what the plaintiffs propose to do is or is not an improvement from the lessors' standpoint. They are sufficiently secured by the covenant to be entered into by the plaintiffs to reinstate the premises in their former condition at the end or sooner determination of the term, a covenant the performance of which is insured by a policy. The sub-section only applies where there is a covenant not to make alterations or additions without the lessors' consent, and it superimposes a condition that the consent of the landlord shall not be unreasonably withheld. If there had been an absolute prohibition against any alterations, the plaintiffs would have had to apply to the county court, as the tribunal under the Act, for a certificate that the proposed improvement was a proper improvement.

The decision in *Balls Brothers, Ld.* v. *Sinclair* (1) follows a decision of Rowlatt J. in *Lilley & Skinner, Ld.* v. *Crump* (2) holding that to make openings in the main wall of a building so as to communicate with adjoining premises was an " improvement " of the premises within the Landlord and Tenant Act, 1927.

[*Stumbles* v. *Whitley* (3) was also referred to.]

Cyril Radcliffe K.C. and *Roger Turnbull* for the defendants. This is not, as has been suggested, a case of grasping landlords endeavouring to secure a large premium for a consent to proposed alterations. Both sides have endeavoured to be reasonable. The defendants' professional advisers have fixed the sum of 7000*l.* as the damage to or diminution in value of their reversion, if these alterations are carried out. The Landlord and Tenant Act, 1927, s. 19, sub-s. 2 (1), does not apply to an absolute covenant, only to a covenant not to make any alterations or additions without the lessors' licence or consent. Here the qualification only applies to the opening words of the covenant, as to alterations on the same premises; that part of the covenant which is directed against making any additions to the demised premises is unqualified and therefore not within the sub-section. Mr. Fox, the surveyor who gave evidence for the defendants, advised them to withhold their consent, and, if it was necessary to name any sum in respect of diminution in value of the reversion, to fix the compensation required at 7000*l.*

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(1) [1931] 2 Ch. 325.
(2) (1929) 73 Sol. J. 366.
(3) [1930] 1 K. B. 393.

The decision in *Balls Brothers, Ld.* v. *Sinclair* (2) is distinguishable in the present case. That applied to alterations, which were held to be improvements, on the demised premises. The case has no application to the present one, where it is sought to add adjoining premises not belonging to the lessors to the demised premises, and to build a new shop on the combined site.

(1) The Landlord and Tenant Act, 1927, provides by s. 19, sub-s. 2: "In all leases whether made before or after the commencement of this Act containing a covenant condition or agreement against the making of improvements without licence or consent, such covenant condition or agreement shall be deemed, notwithstanding any express provision to the contrary, to be subject to a proviso that such licence or consent is not to be unreasonably withheld; but this proviso does not preclude the right to require as a condition of such licence or consent the payment of a reasonable sum in respect of any damage to or diminution in the value of the premises or any neighbouring premises belonging to the landlord, and of any legal or other expenses properly incurred in connexion with such licence or consent nor, in the case of an improvement which does not add to the letting value of the holding, does it preclude the right to require as a condition of such licence or consent, where such a requirement would be reasonable, an undertaking on the part of the tenant to reinstate the premises in the condition in which they were before the improvement was executed."

(2) [1931] 2 Ch. 325.

The four sub-sections of s. 19 must be read quite independently of each other, and the final paragraph of sub-s. 3 enabling the Court to determine, in case of dispute, what is a reasonable sum to pay for the consent of the landlord applies only to cases of alteration of user under sub-s. 3 and not to sub-s. 2 at all.

It is for the Court to decide, on the whole case, whether the lessors' consent has been unreasonably refused. A person cannot unreasonably refuse to pay a reasonable sum.

The covenants of the lease are material on the question of reasonableness, and it is not unreasonable in the lessors to insist on the lessees' obligations being observed. To consent to these alterations would amount to a release of the lessees from their covenant to carry on and keep open the premises as a first-class shop, and not to commit any waste. If the alterations and additions planned by the lessees are carried out, the premises will cease to be a first-class shop; they will become only a portion of a much larger shop.

As to the restoration of the property to its previous limits and condition, legal difficulties, particularly in relation to the right of support, might arise with the adjoining owner. The average purchaser would not willingly entertain the idea of notional staircases or walls.

Fergus Morton K.C. in reply. The transaction with Messrs. Munro, the lessors of the adjoining premises, was entered into on the footing that the plaintiffs had obtained, or were entitled to obtain, the defendants' consent to the proposed alterations. They could not object to the reinstatement of the demised premises as they now are. On the evidence the demand of 7000*l.* as compensation for the alteration, having regard to the covenant for reinstatement, is excessive and unreasonable.

On the construction of the covenant the words "not without the lessors' previous consent in writing" govern the whole of the subsequent words of the clause. To adopt the view that the proposed alteration is not an "improvement" would stultify the effect of the sub-section.

If it has been shown that the alterations would diminish

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the value of the demised premises, then we ask the Court to decide what is a reasonable sum to pay as compensation.

CLAUSON J. By a lease of February 27, 1931, the defendants, two gentlemen named Lambert, being the owners of a property in Bournemouth known as Nos. 18 and 20 Commercial Road, demised to the plaintiffs their property for a term of forty-two years from February 28, 1931, the term terminating in the year 1973, at a rental of 3500*l.* rising to 3750*l.* The property is, as I am told, in a very good if not the best commercial position in Bournemouth. The lease contained a covenant by the lessees " not without the previous consent in writing of the lessors to erect or suffer to be erected any other building upon the said demised premises nor to make or suffer to be made any structural alterations in or additions to the demised premises except that they may carry out such alterations " which had been agreed to before the lease, about which no question arises, with a proviso " that in the event of the lessee company making with the consent and approval of the lessors any further additions, alterations," etc., " of the demised premises at any time during the said term no fine or premium or increase of rent will be demanded for such consent and approval."

The property in question had consisted of two shops. By the time this lease was granted the two shops were converted into one shop. It is material that I should mention that in sub-clause 11 of clause 2 of the lease there is a covenant by the lessees " to use occupy and preserve the demised premises as a first-class shop suited to the neighbourhood . . . . and at all times of the year during the usual business hours of the locality to keep the demised premises open as a first-class shop or shops." Then come these words : " but nothing contained in this lease shall prevent the lessee company from carrying on its business on the demised premises as now carried on at its other branches." There is also a covenant in sub-clause 12 of clause 2 " not to commit or suffer to be committed any waste spoil or destruction on the demised premises." At the time the lease was granted and at the present moment the property is laid out as a shop with various staircases, lavatory accommodation, and so forth, necessary for carrying on the shop in accordance with the best practice of shopkeeping, and with various regulations which affect shops as regards the provision of accommodation for shop assistants.

The plaintiffs have acquired a tenancy of a piece of land at the back of the demised premises, and they desire to pull down the back wall of the shop on the demised premises and to open them up so as to join them to the piece of land of which they have obtained the tenancy at the back of these premises. They are going to make alterations of this character: the back wall of the demised premises having been pulled down, and at a particular point the side wall having been, so to speak, pressed out over the adjoining property which belongs to still a third ground landlord, they propose to erect over the whole combined property one large shop. Among the alterations are alterations of this character: the existing main staircase in the existing shop on the demised premises will be moved away, only one small staircase being left on the demised premises, a staircase obviously insufficient for the user of the demised premises as a self-contained shop. There are other incidental changes, such as, for instance, that lavatories and staff accommodation, etc., are going to be moved to the extension, so that when the alterations are made, instead of the demised premises being occupied by a shop, they will form part of a large shop extending over the demised premises plus the ground at the back.

I may say at once that the change, according to all the evidence, will unquestionably be for the benefit of the plaintiffs in this sense, that they will have a much larger shop in which they will have greater facilities for carrying on the business which they conduct. But it is not disputed (and there is no possible doubt) that the structure which when the alterations are made is left on the demised premises will be not a shop but a fragment of a shop, not usable alone in the condition in which it will then be. It is not usable alone if only because of the absence of sufficient staircase accommodation and the absence of lavatory accommodation, etc. So far as the lease is concerned, it is plain that the alterations are alterations of a character which cannot be made without committing a breach of the covenant which I have read. It will be observed that while the words " without the previous consent in writing of the lessors " are unquestionably included in the covenant not to erect or suffer to be erected any other building, it is not quite plain that those words " without the previous consent in writing of the lessors " are necessarily to be read into the covenant not to make or suffer to be made any structural alterations. But having regard to the clause as a whole and giving a somewhat benevolent construction to it, I am prepared for the purposes of this case to assume that the true construction of the document is that it contains a covenant that the lessees will not without the consent in writing of the lessors make or suffer to be made any structural alterations to the demised premises.

If the matter stopped there it would be obvious that the alterations could not be made without the lessors' consent, a consent which they are not willing to give. The plaintiffs, however, point out that the matter does not rest there. Under the Landlord and Tenant Act, 1927, s. 19, sub-s. 2, the side-note to the section being " Provisions as to covenants not to assign, etc., without licence or consent," the Legislature has enacted that in all the leases whether made before or after the commencement of this Act containing a covenant, condition, or agreement against making improvements without licence or consent such covenant, condition, or agreement shall be deemed, notwithstanding any express condition to the contrary, to be subject to the proviso that such licence or consent is not to be unreasonably withheld. The plaintiffs say that the effect of that is that the defendants' consent to these proposed alterations is not to be unreasonably withheld. The first comment to be made is this: There is not actually in this lease a covenant totidem verbis against the making of improvements without licence or consent. A similar difficulty arose before Luxmoore J. in *Balls Brothers, Ld.* v. *Sinclair.* (1) The effect of that decision so far as I am concerned with it

(1) [1931] 2 Ch. 325.

may, I think, be stated in this way—that it is not essential to the application of this section that there should be a covenant totidem verbis against making improvements without licence or consent, but that it will be sufficient if there is a covenant which on its fair construction is a covenant not to make any alteration, including alterations of the nature of improvements, without licence or consent. Having regard to Luxmoore J.'s judgment in that case, I say no more about it. I follow with respectful agreement his decision in that regard.

There is, however, this rather curious point. It appears to be agreed by counsel in this case—and their agreement seems to be justified by a decision of Rowlatt J. in *Lilley & Skinner, Ld.* v. *Crump* (1)—that while sub-s. 2 of s. 19 will apply to a covenant which contains the words "without licence or consent" it will not apply to a covenant expressed absolutely and without the words "without licence or consent." It is curious that it should be so, because, if it is so, in future leases a lessor who desires to be outside this sub-section need only insist on the omission of the words "without licence or consent" which will not in the least prevent his giving a licence or consent to a breach of covenant expressed in general terms. However, in this particular case, as I say, I am prepared to assume, though there is a little difficulty in the grammatical construction of it, that the covenant against alterations, which I must read having regard to what Luxmoore J. has stated, as a covenant against alterations, including alterations which are in the nature of improvements, is not to be read as an absolute covenant but as a covenant which sufficiently indicates that the words "without licence or consent" shall apply. Accordingly so far the sub-section seems to apply.

The next question which arises is this: there can be no question that if the section is to apply the alterations in question must be alterations which may properly be described in the language of the Act as being improvements. It is on that question that the real importance of this case depends;

(1) 73 Sol. J. 366.

for here it will be observed that, although there is not the least doubt that it will be for the benefit of the plaintiffs as tenants of this and the adjoining property that the alterations should be made, the question arises whether these alterations can be said to be improvements of the property. There is authority for the proposition that improvements are to be regarded rather from the tenant's point of view than that of the landlord's, *Balls Brothers, Ld.* v. *Sinclair* (1), but they must be so regarded, I conceive, from the point of view of the tenant of the demised property. It will be observed that, qua the tenants of the demised property, the plaintiffs do not obtain an advantage from this improvement. Qua tenants of the demised property they become tenants of what has been described, perhaps rather too rhetorically, as a pitiful shell—they become tenants of a portion of some other thing. I find the greatest difficulty in holding that alterations which have the result of destroying the self-contained shop on this property and substituting a fragment of a much larger shop which—though very valuable when worked in connection with the other fragments of the much larger shop—is per se something which is quite valueless, are "improvements" within the meaning of s. 19, sub-s. 2. If the tenants of this shop can for any reason no longer use the part of the shop which is on other premises, they have a thing which they cannot use as a shop at all; it has not the proper staircase, and it has not various other arrangements which are necessary for its use as a shop.

In my view, accordingly, the proposed alterations are not alterations which are of the nature of improvements within the meaning of this sub-section. On that ground alone it appears to me that the plaintiffs are not entitled to call in aid this sub-section to establish that the defendants are bound not unreasonably to withhold their consent to the proposed alterations.

While I am of that opinion, I think that I ought to deal with some further questions which arise in this particular case. Let me assume for the moment that my view is wrong, and that it gives too narrow an interpretation to the term "improvement" in this sub-section; and let me assume that the work which is proposed to be done can be said to be "improvements" within the meaning of this sub-section. The question which I then have to answer is this: have the defendants been unreasonable in refusing their consent? The rest of the section provides this: that the proviso that the licence or consent is not to be unreasonably withheld is to leave it open to the lessor to require payment of a reasonable sum in respect of damage to or diminution in value of the premises, or any neighbouring premises, and any legal or other expenses properly incurred in connection with the licence or consent. There is also a proviso as to the circumstances in which he may require an undertaking on the part of the tenant to reinstate. I do not propose to say more about that part of the section, for throughout it has been recognized by the plaintiffs that, whatever happens, they cannot suggest that the defendants have acted unreasonably in refusing consent unless they, the plaintiffs, are willing not only to carry out the covenant to reinstate, but also to secure the performance of that covenant by a proper insurance policy.

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(1) [1931] 2 Ch. 325.

Assuming for the moment that some reasonable sum is offered by the plaintiffs—a sum which in the opinion of the Court is a reasonable sum in respect of damage to or diminution in value of the premises—it will be observed that there is nothing in this section which makes it clear that, if that sum is offered and is refused by the lessors, the lessors will in those circumstances necessarily be acting unreasonably in withholding their licence or consent. In this particular case I am quite clear that, even if a reasonable sum were fixed, and that reasonable sum were tendered, it could still not be said to be unreasonable for the defendants to refuse consent, and for this reason. The lease contains a covenant, which I have already referred to, that the lessee is to use, occupy, and preserve the demised premises as a first-class shop and is to keep the demised premises open as a first-class shop or shops. Let me assume for the moment that licence and consent are given to the alterations. It is quite clear, in my view, that the effect of the alterations will be to make it impossible to keep the demised premises open as a first-class shop. On the construction of the document it seems to me reasonably clear that to use these premises not as a first-class shop but as a portion of a first-class shop which extends over other premises would be a breach of this covenant. How can it be unreasonable for the lessor to refuse his consent to alterations if, when the alterations are made, he is entitled to prevent the altered premises being used for the only purpose for which, obviously, the alterations are intended to be made? On this ground I should have thought it would be impossible to predicate of the lessors that they were unreasonable in objecting to these alterations being made.

I think, however, the matter may be put more widely. It appears to me that the section leaves it open to the lessor to consider all the circumstances. A perfectly legitimate circumstance for the lessor to consider, in my opinion, would be that the alterations are of such a character that the thing demised becomes substantially different. Various examples have been given in argument, and it was hardly doubted, though perhaps not conceded, that if the nature of the alterations had been to turn this shop, let us say, into a cinema, or into a great open court to be used as a parking place for the purposes of customers who would resort to the new shop at the back, those would be circumstances which would certainly entitle the lessor to say: "The effect of this alteration is entirely to alter the character of the thing which I own, and out of which I expect to get the rent, or which in future I may wish to sell."

I should have thought, accordingly, even apart from the existence of this covenant, that, if the alterations involve such a crucial change in the nature of the demised premises, that is a circumstance which would justify the lessors in refusing their consent to the proposed alterations. Whatever the effect of the section may be, the plaintiffs have to establish, in order that they may be allowed to make the alterations, that the consent of the defendants is being unreasonably withheld.

I have had some evidence before me as to the circumstances in which that consent has been withheld. The material circumstances are these. The defendants, being, apparently, quite willing, if they could do so without detriment to their own interests, to do all they could to help their tenants in achieving an object which apparently would be very advantageous to the plaintiffs, themselves consulted responsible advisers, gentlemen qualified by their professional experience and knowledge, to advise them what would be the effect on the selling value of their reversion of these alterations being made. They were advised by the two gentlemen who gave evidence before me that the effect on the selling value would be very material. One, Mr. Gerald Eve, expressed the view that a sum of 11,000*l.* would be just about the figure to compensate for the diminution in selling value. The other, Mr. Fox, was not prepared to go quite so far as that. He thought that the right figure was about 7000*l.*; and, indeed, it appears that, acting on Mr. Fox's advice, the defendants have expressed their willingness, if 7000*l.* is paid to them, whatever is the exact legal position, to give their consent to the alterations.

Can I hold that their consent has been unreasonably withheld when the defendants have merely asked to have paid to them in respect of this transaction a sum which they are advised by competent advisers to be the figure which will substantially compensate them for loss in selling value? I doubt very much if I could hold that they have acted unreasonably. It is suggested that the plaintiffs are entitled to ask the Court to determine whether some sum less than 7000*l.* is the reasonable figure, and they have asked for a declaration framed on that footing. Apart from all the other difficulties which I have mentioned, I should feel grave difficulty in dealing with this action on that footing. As I understand the matter, the plaintiffs, to get a declaration that they may carry out these alterations without further licence, would have to establish that, having offered a sum which they are prepared to prove to the Court and which the Court finds to be a reasonable sum, the defendants have refused that reasonable sum. Nothing of that sort has occurred. The plaintiffs' action really seems to be framed on the footing that no sum is payable at all. On the evidence which I have had before me whether or not 7000*l.* is a sum which would adequately replace the diminution in selling value which would be occasioned by this very drastic change in the property, I am quite clear that there would be some diminution in the selling value. It is impossible for me on the evidence as it stands to hold otherwise.

It is perfectly true that two expert advisers for the plaintiffs went into the witness-box and expressed the view that the premises would sell as well as a fragment of a much larger shop occupied by tenants of such importance as the plaintiffs as it would if it were a separate property. That evidence was contradicted, and on the mere weight of evidence I should hesitate to accept it as sufficient. But there is this further. The plaintiffs' advisers gave that evidence, as I understood it, on the footing that there would be no question that the covenant to reinstate, insured by an insurance policy in the way that is proposed by the plaintiffs, would be adequately carried out. They both of them were prepared to admit, however, that if there was any legal difficulty in the way their view might necessarily have to be changed. If the reinstatement is to take place it means that, over thirty years hence, just before the term comes to an end, the plaintiffs or their then successors in title will have, so to speak, to shave off from the total shop that part of the shop which is on the demised premises. The question at once suggested itself whether, when that structure has been standing upwards of thirty years, the owner of the adjoining property might not be in a position to raise some difficulty as to support being taken away from the structure on his ground. I do not know whether that may be so or not; but I cannot help thinking that it is by no means so clear as the plaintiffs' expert advisers assume that effect could be given without any difficulty to the covenant to reinstate.

I have stated a number of difficulties which seem to me to lie in the way of the plaintiffs' case. The result of it is that I find it quite impossible either to grant the plaintiffs the declaration for which they ask in the first instance, that " the defendants are not entitled to withhold their consent," nor can I declare "that in the events which have happened the plaintiffs are entitled without any further request for licence or consent on the part of the defendants and on payment of a reasonable sum to make the improvements." No reasonable sum, as I understand, has been offered by the plaintiffs. That second declaration has been amended, and now a declaration is asked for in this form: "That in the events which have happened the plaintiffs are entitled to make the said improvements without any further request for licence or consent on the part of the defendants but subject to the plaintiffs (*a*) undertaking to reinstate the demised premises at the end or sooner determination of the said term in the condition in which they now are; (*b*) securing the performance of the said undertaking by a policy of insurance in an office of repute or in such other manner as this honourable Court may deem satisfactory; and (*c*) paying to the defendants such sum (if any) as this honourable Court shall deem to be reasonable in respect of the damage." It is suggested that I should in this action direct an inquiry as to what would be a reasonable sum. My answer to that is that, as I read the Act, I cannot find jurisdiction given to this Court to conduct such an inquiry. I entirely agree that if the plaintiffs, as part of their case, put forward the contention that x*l*., which they have offered to pay, or are ready and willing to pay, is a reasonable sum the Court may have, on proper evidence, to determine the issue aye or no is that a reasonable sum. But I feel the gravest doubt whether this Court would be in a position in such an action as this to direct an inquiry what would be a reasonable sum.

However, I need not pursue that matter further because, having regard to the various difficulties which I have stated, I cannot see that any course is open to me except to dismiss the action, with costs.

Solicitors: *Lovell, White & King; Robins, Hay & Waters, for Lacey & Son, Bournemouth.*

H. L. L.

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July 25, 26, 27; *Dec.* 21.

In re ECCLESIASTICAL COMMISSIONERS FOR ENGLAND'S CONVEYANCE

AND

In re THE LAW OF PROPERTY ACT, 1925.

[1934. W. 1086.]

Restrictive Covenants—Covenants running with the land—Separate covenant with assigns of Vendors, owners for the time being of adjoining or adjacent land—Successors in title of assigns not parties to the deed of covenant—Right to enforce—Real Property Act, 1845 (8 *&* 9 *Vict. c.* 106), *s.* 5—*Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *ss.* 56, *sub-s.* 1; 58, *sub-s.* 1; 84, *sub-s.* 2; *and s.* 203, *sub-s.* 2 (*a*).

By a conveyance dated April 21, 1887, and made between the Ecclesiastical Commissioners for England of the one part and one H. G. G. of the other part, a freehold house and land known as "W. H. House" were conveyed to H. G. G. By the conveyance H. G. G. for himself and his assigns and to the intent and so as to bind not only himself . . . . but also all future owners and tenants of the said land thereby conveyed or any part thereof and so that the obligations provisions and restrictions thereinafter expressed and contained might run with and bind the said land and every part thereof into whosesoever hands the same might come covenanted with the Ecclesiastical Commissioners and their successors and also as a separate covenant with their assigns owners for the time being of the lands adjoining or adjacent to the said land thereby conveyed to observe and perform a number of restrictive covenants. There was no building scheme affecting W. H. House or the surrounding land.

There were several other plots of freehold land and houses adjoining or near to W. H. House which had been conveyed by the original vendors, the Ecclesiastical Commissioners, to various purchasers before the date of the conveyance of April 21, 1887, and had subsequently been assigned by those purchasers.

The estate owners of W. H. House and land took out an originating summons for a declaration that the said house and land were no longer subject to any of the restrictive covenants contained in the 1887 conveyance, or in the alternative that it might be determined whether the said restrictive covenants or any and which of them were enforceable, and if so by whom.

The respondents included the successors in title to some of the houses and land which had been sold by the Ecclesiastical

Commissioners before the date of the deed of April 21, 1887. Some of these adjoined W. H. House and land and others were near but not actually adjoining thereto :—

Held, that, on the true construction of the covenant, the land referred to as "adjacent" included certain plots of land near to but not adjoining W. H. House, and that the original covenantees who were purchasers of the land so held to be adjoining or adjacent to W. H. House and the present owners of such land were entitled to enforce the covenants, although the original covenantees were not parties to the conveyance of April 21, 1887.

ORIGINATING SUMMONS.

By these proceedings the applicants, J. F. Mathieson and G. H. Hudson Lyall, who were the estate owners of a certain freehold house and land known as "West Heath House," West Heath Road, Hampstead, in the parish of Hendon, in the county of Middlesex, claimed pursuant to s. 84, sub-s. 2, of the Law of Property Act, 1925, a declaration (1.) that the freehold hereditaments which were comprised in a conveyance dated April 21, 1887, and made between the Ecclesiastical Commissioners for England of the one part and one Henry G. Gotto of the other part were no longer subject to any of the restrictive covenants contained in the said conveyance, or (2.) in the alternative that it might be declared whether the restrictive covenants or any and which of them were now enforceable, and if so by whom.

The material facts are shortly stated in the headnote and are more fully set out in the judgment of the learned judge.

R. F. Roxburgh K.C. and *J. Neville Gray* for the applicants, estate owners of the freehold house and land known as "West Heath House, Hampstead." The question is really one of the construction of the conveyance of April 21, 1887, and whether certain restrictive covenants therein contained now affect the property thereby conveyed. The then purchaser, H. G. Gotto, in that conveyance entered into a covenant with the vendors, the Ecclesiastical Commissioners, covenanting for himself (the covenantor) and his assigns and to the intent and so as to bind not only himself (the covenantor) his heirs executors and administrators but also future owners and tenants of the said land thereby conveyed or any part thereof and so that the obligations provisions and restrictions thereinafter expressed and contained might run with and bind the said land and every part thereof into whosesoever hands the same might come with the then vendors (the covenantees) and their successors, and also as a separate covenant with their assigns owners for the time being of the lands adjoining or adjacent to the said land thereby conveyed in the manner following. Then follow the various restrictive covenants affecting the property adjoining or adjacent to West Heath House.

These covenants were restrictive in character and in a form which makes the burden of them run with the land in equity. With regard to these particular covenants, their enforcement can only be carried out by the original covenantees, the Ecclesiastical Commissioners, and their successors in title; the land must—in the case of the latter—have been limited to those owners whose land belonged to the original covenantees at the time of the execution of the conveyance in 1887. A somewhat similar point as to the enforcement of restrictive covenants arose in a case which came before the Court, *In re Sunnyfield* (1), and which concerned another freehold house in the immediate vicinity of West Heath House. The property is not subject to any restrictions under what is called a building scheme; and therefore the question of any change of the character of the houses in the neighbourhood need not be considered: compare *Duke of Bedford* v. *Trustees of the British Museum* (2); *Sayers* v. *Collyer.* (3)

Further it is submitted that these covenants cannot be enforced by owners who are neither express assignees of the benefit of the covenants nor successors in title of the original covenantees in respect of the land purchased by such successors from the original vendors after the date of the deed which imposed these covenants.

It is very material also to consider the words in the

(1) [1932] 1 Ch. 79.
(2) (1822) 2 My. & K. 552.
(3) (1884) 28 Ch. D. 103.

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conveyance of 1887: "owners for the time being of the lands adjoining or adjacent to the said land hereby conveyed." For this purpose the agreed plan must be looked at and these words carefully considered. [The plan referred to in the judgment of the learned judge was then considered and the situation of the properties shown thereon as they affected West Heath House.] The case of *Rogers* v. *Hosegood* (1) was referred to.

C. J. Radcliffe for the respondent, Mrs. L. Freeman. The benefit of a covenant running with the land may be taken advantage of by a successor in title of the original covenantee. All assigns of the Ecclesiastical Commissioners of land adjoining or adjacent to West Heath House were original covenantees, though they were not parties to the deed: see Law of Property Act, 1925, s. 56, the wording of which is wider than s. 5 of the Real Property Act, 1845. This section was considered in *Dyson* v. *Forster* (2); see also Norton on Deeds, 2nd ed., p. 29; s. 78 of the Law of Property Act, 1925, and Wolstenholme and Cherry's Conveyancing Statutes, vol. i., p. 358.

J. A. Reid for the respondent, Mrs. A. Wix, referred to *Chatsworth Estates Co.* v. *Fewell* (3). All the land owned by the persons represented by Mrs. Wix is adjoining or adjacent to West Heath House. "Adjacent," when used in contradistinction to "adjoining," means "near": *Mayor of Wellington* v. *Mayor of Lower Hutt* (4).

W. F. Waite for the Ecclesiastical Commissioners did not oppose the application.

R. F. Roxburgh K.C. in reply. The main question is really to what land these covenants have become annexed. Reliance has been placed on s. 56 of the Law of Property Act, 1925, replacing s. 5 of the Real Property Act, 1845; the question whether this latter section must be confined to covenants running with the land was doubted by Lord Macnaghten in *Dyson* v. *Forster* (2), and although those particular covenants now under consideration by the Court do run with the land,

(1) [1900] 2 Ch. 388.
(2) [1909] A. C. 98, 102.
(3) [1931] 1 Ch. 224.
(4) [1904] A. C. 773.

yet it is submitted they cannot now be taken advantage of by the respondents, who are not within the ambit of s. 56. On the question of strangers to a contract enforcing it, the remarks of Lord Haldane in *Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co.* (1) are not unimportant. [He referred to *Grant* v. *Edmondson* (2) for the remarks of Lawrence L.J. and Romer L.J. and *In re Union of London and Smith's Bank Ld.'s Conveyance*; *Miles* v. *Easter.* (3)]

Cur. adv. vult.

1934. Dec. 21. LUXMOORE J. The applicants, James Francis Mathieson and George Henry Hudson Lyall, are the estate owners in fee simple of a freehold house and land situate in West Heath Road, Hampstead, in the parish of Hendon in the county of Middlesex, and known as "West Heath House." They are the successors in title of one Henry Gaisford Gotto, to whom the property was conveyed by the Ecclesiastical Commissioners for England by a conveyance dated April 21, 1887. This conveyance contains restrictive covenants.

By s. 84, sub-s. 2, of the Law of Property Act, 1925, it is provided that "the court shall have power, on the application of any person interested—(*a*) to declare whether or not in any particular case any freehold land is affected by a restriction imposed by any instrument; or (*b*) to declare what, upon the true construction of any instrument purporting to impose a restriction, is the nature and extent of the restriction thereby imposed and whether the same is enforceable and if so by whom."

The applicants have taken out an originating summons under the provisions of s. 203, sub-s. 2 (*a*), of the same Act, asking for a declaration under s. 84 that West Heath House is no longer subject to any of the restrictive covenants contained in the conveyance of April 21, 1887. In the alternative they ask for the determination of the questions whether the restrictive covenants or any and which of them are now enforceable, and if so by whom.

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(1) [1915] A. C. 847, 853.

(2) [1931] 1 Ch. 1, 27, 28.

(3) [1933] Ch. 611.

The respondents to the originating summons are the Ecclesiastical Commissioners for England, a Mrs. Lucy Freeman and a Mrs. Annie Wix. Mrs. Lucy Freeman is the owner of freehold hereditaments situate in West Heath Road aforesaid, and known as "St. Margaret's." This property is situate on the north side of West Heath Road immediately opposite West Heath House. Mrs. Annie Wix is the owner of freehold hereditaments situate and being No. 546 Finchley Road, Hampstead. The two last-named respondents were added as the result of inquiries made by the applicants to give effect to the recommendations and suggestions made by Maugham J. in *In re Sunnyfield.* (1) The application in that case was also made under s. 84, the property there in question being situate on the south side of West Heath Road, and on the east side of West Heath House but separated from it by two other houses. As the result of these inquiries, Mrs. Freeman notified the applicants that she desired to oppose their application, and Mrs. Wix was added as a respondent to represent the interests of a large number of owners of property situate in the Finchley Road. The Ecclesiastical Commissioners offer no opposition to the making of a declaration that the restrictions in the conveyance of April 21, 1887, are no longer enforceable.

The questions to be determined are: (1.) were any restrictions imposed on West Heath House before or by the conveyance of April 21, 1887; (2.) were such restrictions imposed for the benefit of any, and what other hereditaments; and (3.) who are the persons, if any, now entitled to the benefit of such restrictive covenants? It is not contended by any of the parties that West Heath House forms part of a larger estate which has been subjected to what is usually referred to as a building scheme, and it is quite plain that there is not sufficient evidence on which it could be argued with any hope of success that such a scheme existed. The conveyance of April 21, 1887, contains covenants by Henry Gaisford Gotto in these words: "The said Henry Gaisford Gotto doth hereby for himself and his assigns and to the intent

(1) [1932] 1 Ch. 79.

and so as to bind not only himself his heirs executors and administrators but also all future owners and tenants of the said land hereby conveyed or any part thereof and so that the obligations provisions and restrictions hereinafter expressed and contained may run with and bind the said land and every part thereof into whosesoever hands the same may come covenant with the said Ecclesiastical Commissioners and their successors and also as a separate covenant with their assigns owners for the time being of the land adjoining or adjacent to the said land hereby conveyed in manner following that is to say:—" A number of covenants follow. I think it is only material to refer to those numbered 2, 3 and 4. They are as follows: "(2.) That no messuage or building which now is or may at any time hereafter be standing on the said land hereby conveyed or any part thereof shall be used for any purpose whatsoever other than as a private dwellinghouse. (3.) That nothing shall at any time hereafter be done or permitted upon the said land hereby conveyed or any part thereof which may be or tend to be a nuisance to the neighbourhood or grow to the injury or annoyance of the adjoining or adjacent property or any part thereof or the owners lessees or tenants thereof respectively. (4.) That no building or erection shall at any time hereafter be erected or set up nor shall any addition to any building or erection be made on any part of the said land hereby conveyed without the previous licence in writing of the said Ecclesiastical Commissioners or their successors or assigns: Provided always that one or two (but not more) private dwellinghouse or private dwellinghouses may be erected upon such part of the said land hereby conveyed as is colored red in the said plan . . . ."; and then follow a number of provisions as to the cost of such house or houses and as to the approval of the plans, designs and specifications thereof. No restrictive covenants other than those to which I have referred can be said to affect West Heath House. This answers the first question.

Having ascertained that restrictive covenants were imposed in respect of the West Heath House property and that the form of the covenants is such as to make the burden of them run with the land, it is necessary to consider whether they were imposed for the benefit of any and what other hereditaments. For it is well settled that, apart from any building scheme, restrictive covenants may be enforced if they are expressed in the original deed to be for the benefit of a particular parcel or particular parcels of land, either expressly mentioned or clearly identified in the deed containing the original covenants. It was argued on behalf of the applicants that the right to enforce such covenants is limited to the original covenantees and their successors in title—the right in the case of the successors in title being limited to those whose land was the property of the original covenantees at the date when the covenants were imposed. It was also argued that the right to enforce the covenants did not extend to any owners of land who were neither express assignees of the benefit of the covenants, nor successors in title of the original covenantees in respect of land acquired by such successors from the Ecclesiastical Commissioners subsequent to the date of the deed by which the covenants were imposed. I think these arguments failed to give due consideration to the provisions of s. 5 of the Real Property Act, 1845, as repealed and re-enacted by s. 56 of the Law of Property Act, 1925. Sect. 5 of the Act of 1845 provides that under an indenture, executed after October 1, 1845, the benefit of a condition or covenant respecting any tenements or hereditaments may be taken, although the taker thereof be not named as a party to the indenture. In the case of *Forster* v. *Elvet Colliery Co., Ld.* (1), it was held that the condition or covenant referred to in the section must, in order to be enforceable by a person not a party to the deed, be one the benefit of which runs with the land of the person seeking to enforce it. The actual decision was upheld in the House of Lords under the name *Dyson* v. *Forster* (2), but Lord Macnaghten expressed doubt whether the section ought to be so restricted. He refrained however from resolving the doubt, because he agreed with the view that the covenants

(1) [1908] 1 K. B. 629.

(2) [1909] A. C. 98, 102.

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in the particular case ran with the land and it was therefore unnecessary to do so.

The alteration which has been made in the verbiage of s. 5 of the 1845 Act by s. 56 of the 1925 Act, has not in my opinion affected the position so as to limit the right of a person not a party to the deed to enforce covenants affecting land to those which run with the land. The material words are as follows: "A person may take .... the benefit of any condition, ... covenant or agreement .... respecting land or other property, although he may not be named as a party to the conveyance or other instrument." It seems to me that the effect of these words is to enlarge the scope of the earlier words, for it extends the rights of a person not a party to a deed to covenants affecting every kind of property personal as well as real. So far as every species of personal property other than leasehold is concerned it is obvious that the covenants to be enforced cannot be restricted to those running with the property, for there are no such covenants. What it is necessary to consider is the true construction of the conveyance of April 21, 1887, in order to ascertain whether any persons, not parties thereto, are described therein as the covenantees, and whether such covenants are expressed to affect any and what hereditaments. To determine what is the true construction of that document it is necessary to consider the surrounding circumstances as they existed at the date when it was executed.

[His Lordship referred to a plan showing a considerable area of land at Hampstead in the vicinity of the Finchley Road on which West Heath House was shown bounded on the North-West and North-East by West Heath Road and lying between 200 to 400 feet to the East of Finchley Road. The plan showed certain land coloured blue on the further side of the Finchley Road which was still owned by the Ecclesiastical Commissioners. The plan also showed certain land coloured green bounded on the west by Finchley Road and separated from West Heath House by intervening pieces of land. The land coloured green was leased by the Ecclesiastical Commissioners in 1877 for 99 years and subsequently for 999 years. The plan also showed, surrounded by a red verge line, West Heath House, and the following plots of land which had been conveyed by the Ecclesiastical Commissioners before the conveyance of West Heath House to H. G. Gotto, as follows:—Plot C 125629, which faced Finchley Road and was separated from West Heath House by an intervening plot, was conveyed on August 6, 1868, to one H. W. Burgess. Plot C 160233, which adjoined West Heath Road on the side opposite to West Heath House, and Plot C 160236, which adjoined West Heath House, on the South-East side, were conveyed on April 3, 1873, to one J. H. Dallmeyer. Plot C 205311, known as "St. Margaret's," was immediately opposite West Heath House, from which it was separated by West Heath Road, and was conveyed to one P. W. May on July 28, 1881, and at the date of the proceedings was owned by the respondent, Mrs. Lucy Freeman. Plot C 207392 was also opposite to West Heath House, separated by West Heath Road, and was conveyed on February 20, 1882, to the late W. Ambrose Q.C. Plot C 214071, which was separated from West Heath House by intervening land, was conveyed to one Moses Bayliss on March 15, 1883, and plot C 211402, the South-West corner of which was opposite to the most Easterly point of West Heath House, was conveyed on August 28, 1883, to one F. C. Mathieson. All these conveyances were subject to various restrictions which differed in some respects from the restrictions imposed upon West Heath House. His Lordship then continued:]

In the result it is plain that at the date of the conveyance of West Heath House to Mr. Gotto, the Ecclesiastical Commissioners had parted with all the rest of the land within the red verge line and had leased the land coloured green for a term of 999 years. They remained the owners of the freehold reversion in the green land and the freehold of the land coloured blue. They owned no land adjoining West Heath House.

The covenants in the conveyance of April 21, 1887, were entered into by Mr. H. G. Gotto with the Ecclesiastical Commissioners and their successors, and also as separate covenants with their assigns, owners for the time being of the lands adjoining or adjacent to the land thereby conveyed, that is, West Heath House. It is to be observed that in the case of the Ecclesiastical Commissioners and their successors, there is no limitation of the covenant at all, for I think the words " owners for the time being of the lands adjoining or adjacent to the land hereby conveyed " qualify the word " assigns " only, and cannot grammatically be read as qualifying the words " the Ecclesiastical Commissioners and their successors." It is true that the word " assigns " is in a dependent clause, but the clause is distinct from that which immediately precedes it. The object of the clause appears to have been to denote the particular hereditaments which were to be entitled to the benefit of the covenants. If it was intended that the covenants should only apply to land then belonging to the Ecclesiastical Commissioners, there was no necessity for any mention of " the assigns," for " the assigns " of such land or any part of it would have been entitled to the benefit of the covenant with the Ecclesiastical Commissioners and their successors under the provisions of s. 58, sub-s. 1, of the Conveyancing and Law of Property Act, 1881. The clause in question provides that the persons entitled to the benefit of the covenant are to be owners of adjoining or adjacent land and also assigns of the Ecclesiastical Commissioners; in other words, they must hold land which formerly belonged to the Ecclesiastical Commissioners. The decision in *Forster* v. *Elvet Colliery Co., Ld.* (1), appears to me to support this construction. Further the assigns must own lands which either adjoin or are adjacent to West Heath House. When used in conjunction with the word " land," the word " adjoining " in its primary sense means that which lies near so as to touch in some part the land which it is said to adjoin. Of necessity it connotes contiguity. The only land which in fact is adjoining West Heath House in this sense is the land numbered "C 160236" on the plan; this land touches the West Heath House property on its South-east side and was conveyed by the Ecclesiastical Commissioners to Mr. J. H. Dallmeyer by the conveyance of April 3, 1873. The word "adjacent" when used in contradistinction to the word "adjoining" means I think that which lies near but is not in actual contact with land. The degree of proximity must depend on the circumstances of each case. As Sir Arthur Wilson said in the case of *Mayor of Wellington* v. *Mayor of Lower Hutt* (1): "'Adjacent' is not a word to which a precise and uniform meaning is attached by ordinary usage. It is not confined to places adjoining, and it includes places close to or near. What degree of proximity would justify the application of the word is entirely a question of circumstances." Bearing this in mind and considering all the circumstances of this case, I think on the true construction of the covenant, the land which is referred to as "adjacent" to West Heath House includes all those plots which are numbered "C 160233," "C 205311," "C 207392" and "C 211402," and does not include any part of the land coloured blue or green on the said plan. I am further of opinion that "the assigns" referred to as the covenantees are those persons who were the owners of the land which I have held to be "the land adjoining or adjacent" to West Heath House at the date of the conveyance to Mr. H. G. Gotto, for they were in each case the assigns of the Ecclesiastical Commissioners.

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(1) [1908] 1 K. B. 629.

In my judgment the original covenantees and the persons deriving title under them can still sue on the covenants in question, although the original covenantees were not parties to the conveyance of April 21, 1887, and I therefore hold that Mrs. Lucy Freeman, as the assignee of the plot numbered "C 205311," called "St. Margaret's," is still entitled to enforce the said covenants, as also are the present owners of the freehold of the plots "C 160233," "C 207392," "C 211402" and "C. 160236."

It follows from what I have said that none of the persons

(1) [1904] A. C. 773, 775.

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entitled to any part of the land comprised in plot "C 125629" whose interests the respondent, Mrs. Wix, was added to represent, nor any of the persons now entitled to any part of the land coloured green are entitled to enforce the covenant. I will therefore make the appropriate declarations.

Solicitors: *Markby, Stewart & Wadesons; Milles, Jennings & Co.; Arthur Benjamin & Cohen; E. F. Turner & Sons.*

A. R. T.

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In re HOOPER.

HOOPER *v.* CARPENTER.

[1935. H. 707.]

Will—Construction—Gift to "such person or persons as at the decease of my said wife shall be my heir or heirs at law"—Wife predeceasing testator.

By his will dated October 11, 1901, a testator gave his residuary estate to trustees upon trust for his mother and wife for successive life interests and after the death of his wife (if she should have survived his mother) upon trust "for such person or persons as at the decease of my said wife shall be my heir or heirs at law absolutely." The mother died on July 28, 1909, and the wife on January 25, 1924. The testator died on August 8, 1934:—

Held, by the Court of Appeal (Lord Wright M.R. and Romer L.J., Greene L.J. dissenting) that there was an effective gift to the person who would have been the testator's heir if he had died on the date of the death of his wife.

Decision of Clauson J. reversed.

Appeal from Clauson J.

By his will dated October 11, 1901, Bartlem K. Hooper after appointing his mother Ann Priscilla Hooper to be the sole executrix and trustee of his will and making a bequest gave and devised his freehold house and premises No. 18, Saxon Road, Bow, together with all the household effects in or upon the said premises and also all other freehold or other

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real properties and all leasehold and personal properties of which he might die seised or possessed to his mother upon trust to receive the rents, profits or income thereof and apply the same for her own absolute use and benefit during her life she paying thereout to his wife Jane Ann Hooper during her life an annuity or yearly sum of 100*l.* to be paid by equal quarterly payments and from and after the death of his mother upon trust for his wife (if she should then be living) for her own absolute use and benefit during her life and after her death (if she should have survived his mother) upon trust " for such person or persons as at the decease of my said wife shall be my heir or heirs at law absolutely: Provided always that if my said wife shall predecease my mother then and in such case all the said freehold leasehold and personal properties furniture and effects shall belong to my mother absolutely."

The testator died on August 8, 1934. His mother and wife predeceased him, his mother having died on July 28, 1909, and his wife on January 25, 1924.

Administration with the will annexed was granted on October 16, 1934, to the plaintiff, a cousin of the testator, and he took out a summons asking (amongst other questions) who upon the true construction of the testator's will and in the events which had happened were entitled under the gifts of his residuary estate " upon trust for such person or persons as at the decease of my said wife shall be my heir or heirs at law absolutely."

Clauson J. said that the trust for the testator's mother for life subject to paying an annuity to the wife showed that he contemplated that at his death his mother and wife would both be living. Thus the trust in favour of the wife for life on the death of the mother was contingent upon the wife's surviving both the mother and the testator, so that the final trust " from and after the death of my said wife (if she shall have survived my mother) . . . . for such person or persons as at the death of my said wife shall be my heir or heirs at law absolutely " was a trust in favour of a class of heirs to be ascertained not at the date of the testator's death, but as if he had died at the date that his wife having survived him died.

It was, however, argued that the disposition should be construed as applying in the event which had happened of the wife and the mother predeceasing the testator. The difficulties in the way of this were great. He (his Lordship) could not conceive a man's intending a class of heirs to be ascertained at a period during his own lifetime. Further it would produce the astonishing result that the dispositions would seem to be affected by the seemingly immaterial question whether during his lifetime the wife predeceased the mother or the mother the wife. On the whole he decided that there was in the circumstances no effective disposition, with the result that the testator died intestate.

The defendant Millicent Lucy Mary Carpenter appealed. She was the person who would have been the testator's heiress at law if he had died at the date of the death of his wife, and she asked for a declaration that she was absolutely entitled to the residuary estate of the testator under the gift " upon trust for such person or persons as at the decease of my said wife shall be my heir or heirs at law absolutely." The appeal was heard on February 19, 1936.

Norman Daynes K.C. and *G. P. Slade* for the appellant. There is no ground for holding that the gift " for such person or persons as at the decease of my said wife shall be my heir or heirs at law," fails because the testator's wife predeceased him. The gift involves the hypothesis that the testator died when his wife died and the same hypothesis applies whether the wife survives or predeceases the testator. It is said that no one can be the heir of a living person and therefore that the use of the word " heir " involves the testator being dead when the class to take falls to be ascertained. But this argument ignores the fact that the gift involves the hypothesis of the testator's earlier death. The word " heir " is used in its natural sense, that sense in which a man while still living refers to someone as being his heir. He means his heir apparent or presumptive at the time he speaks. So here it is the person who is the testator's heir presumptive at the date of his wife's death who takes.

F. H. L. Errington for one of the persons entitled on an intestacy. It is commonly said that nemo est haeres viventis and that is really conclusive in the present case. The words "heir or heirs at law" are entirely inappropriate in a case where the person to take under this description requires to be ascertained in the testator's lifetime. There was no heir at the date of the wife's death in his lifetime. The appellant is seeking to have the trust construed as if it read "upon trust for such person or persons as at the decease of my said wife shall be my heir or heirs at law on the assumption that I was dead at that date." There is no justification for adding the final words.

Roger Turnbull for others entitled on an intestacy. The whole will was framed on the footing that the testator's wife would survive him. It is true that the Court leans against an intestacy, but this does not mean that the Court will read into a will a meaning which the language used does not justify: see *Lightfoot* v. *Maybery*. (1) The words "heir or heirs at law" are susceptible of only one meaning—namely, the person or persons who at the death of the testator are his heir or heirs at law. There can be no change in the person who is heir.

[ROMER L.J. If the testator's wife had survived him the person to take under this trust would surely have been someone other than the true heir.]

In any case that cannot be so in the present case as the testator's wife predeceased him. The use of the word "heir" precludes the trust in question from applying in this case.

Lavington for the plaintiff.

Norman Daynes K.C. replied.

LORD WRIGHT M.R. (after stating the facts). The question which has been argued is, what is the meaning of the gift from and after the death of the testator's wife, in the event of her surviving his mother, "for such person or persons as

(1) [1914] A. C. 782, 802.

at the decease of my said wife shall be my heir or heirs at law absolutely"? It is said on the one hand that a man cannot have an heir before his death because nemo est haeres viventis and that, therefore, the use of the word "heir" must involve that the testator is already dead at the death of his wife. The effect of this view would be to create an intestacy, a conclusion against which the Court will always strain because to use the language of Lord Shaw in *Lightfoot* v. *Maybery* (1): "The mind never inclines towards intestacy; it is a dernier ressort in the construction of wills." I may also refer in this connection to the statement in Jarman on Wills (7th ed.), vol. 3, p. 2146: "The rules of construction cannot be strained to bring a devise within the rules of law; but it seems that, where the will admits of two constructions, that is to be preferred which will render it valid; and therefore the Court, in one instance, adhered to the literal language of the testator, though it was highly probable that he had written a word, by mistake, for one which would have rendered the devise void."

The argument put forward by Mr. Errington involves, as it seems to me, a somewhat curious use of the word "heir." According to that argument, if the wife had died after the testator the rule of construction requires the ascertainment of the individual who would have been the testator's heir if he had died at the time his wife died as a persona designata. That is an artificial person because the actual "heir" in the strict sense of the term must be the person who at his death is his heir. But if by some artificial reasoning the person is to be ascertained who would have been his "heir" if he had died at an entirely different time—that is, at the date, assumed to be subsequent to the date of the testator's death, when his wife died—a very artificial and unnatural use is being made of the term "heir." On the other hand the construction contended for by Mr. Norman Daynes is to my mind much simpler; and it is in accordance with the rule that inclines against an intestacy and, I should think, is more in accordance with what the testator would naturally be taken

(1) [1914] A. C. 782, 802.

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to have intended. If the word "heir" as used in this gift is in its popular sense and in the way in which people constantly use the word—the sense which it is not unnatural to apply to a will so curiously drawn as this—then it may well be construed to mean the person who "shall be"—the language speaks from the date of the will—"my heir at the decease of my wife whether or not I have then died." In other words the testator may be treated as saying: "If my wife predeceases me there will have to be ascertained as a persona designata the person who, according to the ordinary rules of inheritance, would be my heir if I were myself to die at that time"—that is, the heir apparent or heir presumptive at that time there being for this purpose no material distinction between them. If the word "heir" be construed in the popular sense exemplified by the ordinary practice of saying "so and so is my heir," then I find no difficulty in applying the words contained in this disposition to the case where the wife has died in the testator's lifetime and the testator may be taken to be saying to himself: "my mother is dead; my wife is dead; I intend my property to go to my heir and my heir is known now that my wife has died and I have no one else to provide for." In that case I apprehend that it would be quite natural and easy to say, though the testator was at the time still living, who was his heir according to the popular interpretation.

For these reasons the appeal against the order of Clauson J. should in my opinion be allowed.

ROMER L.J. I have come to the same conclusion. It is said that the testator contemplated that his wife would survive him. It is more than probable; but it does not follow that he intended his will to take effect only in the event of his wife surviving him. Nothing surely is better settled as regards the construction of wills than that, if a testator gives property to A for life and directs that after A's death the property shall go, say, to A's issue then surviving, the gift to A's issue takes effect whether A predeceases the testator or survives him, subject of course to this distinction, that if

Romer L.J.

A predeceases the testator, only those of his issue who were then living and who survive the testator will take. If A survives the testator the class of his issue will remain open until A's death.

Bearing that in mind I turn to this will. The fact that the mother takes a first life interest appears to me to be wholly immaterial, I can treat this will as though the testator had given his wife a life interest in his residue and then directed that on the death of his wife the residue should go to such person or persons as at the decease of his wife should be his heir or heirs at law absolutely. Suppose the wife had survived the testator. With all deference to Mr. Turnbull's argument nobody can really have any doubt as to what the testator has directed. It is that on the death of his wife his property shall go not to his heir at law but to someone who would have been his heir at law if he had died at the same time as his wife. Mr. Turnbull has asked us to treat the words as meaning no more than "my heir or heirs at law," and he says that the person who is the testator's heir at law at his death will continue to be his heir at law—I do not know whether he means as long as the heir at law lives or for all eternity. But that is to disregard the words "as at the decease of my said wife shall be my heir or heirs at law." I think it is plain, with all respect to that argument, that if the wife had survived, on her death the residue would have gone not to the testator's heir at law, but to the person who would have been his heir at law if he had died on the date of his wife's death.

Why then should the fact that his wife predeceased him make any difference? The testator has told us: "I want this property to go to my wife for life and after her death I desire it to go if she survives me not to my heir at law but to such person as would be my heir at law if I died perhaps ten years later when my wife dies or if she predeceases me by (say) ten years to such person as would be my heir at law if I died ten years before I in fact do die." There could be no difficulty in ascertaining who would have been the testator's heir at law if he had died ten years later than he in fact died. Why then should there be any difficulty in ascertaining who would have been the testator's heir at law if he had died ten years before he in fact died ? With the greatest possible respect to those taking the opposite view, I cannot see any answer to Mr. Norman Daynes' argument and in my opinion the appeal must be allowed.

GREENE L.J. I have the misfortune to take a different view, and in my opinion the judgment of Clauson J. on the question of construction was right. " In every case of a gift ' to my next of kin,' or ' my nearest relations ' or any gift of that kind, prima facie the rule is, and I think it is not only a rule of construction, but the natural meaning of the words, that the class is to be ascertained at the death of the testator." Those were the words of Parker J. in *In re Winn* (1). There are of course familiar cases where that rule is not applicable. There are many cases (and we are all familiar with them) where the words " next of kin " or " heir " in a particular context have to be construed so as to cover, and to cover only, an artificial class, that is to say, a class to be ascertained on a particular hypothesis. In a case where a testator bequeaths property to A for life and on A's death " to those who at A's death shall be my next of kin," the artificial class has to be ascertained upon the hypothesis that the testator died at the death of A. I read a sentence from Theobald on Wills, 8th ed., p. 377, not as an authority but as describing in apt language the class of case to which I am referring : " But if the gift is, after the decease of the tenant for life, to such persons as shall then be my next of kin, the word ' then ' must refer to the death of the tenant for life ; . . . . and in such a case the class is to be ascertained as if the testator had lived up to and died at the time referred to." It appears to me, notwithstanding the argument of Mr. Turnbull, that the present case falls within that class and that the language used is apt language to cover an artificial class of heir or heirs at law, that is to say, a class ascertained not at what is prima facie the right time, the death of the testator, but at some other time.

(1) [1910] 1 Ch. 278, 286.

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Greene L.J.

That of course involves inserting the words "as if I had died at that date." There is no difficulty at all in inserting these words if the hypothesis which the words cover is a hypothesis relating to a date subsequent to the death of the testator himself, because in those circumstances the word "heir" and the words "next of kin" are not diametrically opposed to that hypothesis but are consistent with it although in an artificial sense.

In the present case, what the lady who is represented by Mr. Norman Daynes has to establish is that at the death of the wife she was the person whom the description fitted. In the first place a testator who is contemplating a class to be ascertained on the hypothesis that he died in his own lifetime would not in my opinion choose a word such as "heir" or "heirs." If he is contemplating that the class is to be ascertained when he is in fact dead, the use of those words is apt whether he is contemplating that it is to be ascertained at his death or at some subsequent date. It appears to me that the words "my heir or heirs at law" are quite inapt to describe a relationship to a person who is in fact living. If the contention of Mr. Norman Daynes is right, it involves implying in this will words which appear to me to be quite inconsistent with the words "heir or heirs at law"; it involves writing in these words "as if, in the case of my wife predeceasing me, I had died at the moment of her death." It seems to me that it is not legitimate to imply words of that kind which are quite inconsistent with the words used because these words are "my heir or heirs at law," words which exclude in my humble judgment the ascertainment of that class on the basis of a hypothetical death of the testator in his own lifetime.

The point is a short one and, to a certain extent, I think, a matter of impression; but I found my judgment entirely on the use of the words "shall be my heir or heirs at law," which in my opinion are too strong to permit of their being construed in relation to a date anterior to the testator's death, although they would be susceptible, in an appropriate case, of being construed in relation to a date subsequent to his death which is the common class of case to which I have referred.

I would dismiss the appeal.

Appeal allowed.

Solicitors: *Hedley Norris & Co., for Hobbs, Hamilton & Hobbs, Bristol; Crawley, Arnold & Co.; Rider, Heaton Meredith & Mills; Spring & Co.*

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[1934. D. 1272.]

Covenant—Restrictive covenant—Assignment of part of land—Whether benefit enures to assign.

In a deed by which certain lands held by trustees on trust for sale were partitioned among the beneficiaries the trustees "for themselves and their assigns to the intent and so that the covenants hereinafter contained shall be binding on the lands and premises hereby assured into whosesoever hands the same may come . . . . covenant with the respective parties . . . . and other the owners or owner for the time being of the remaining hereditaments so agreed to be partitioned as aforesaid and not hereby assured that the trustees their heirs and assigns will at all times hereafter perform and observe the restrictions and stipulations set out in the said schedule hereto so far as they concern the lands hereby assured." One of the restrictions as set out in the schedule prohibited the erection on any plot of a house of less than a defined cubical content.

The plaintiff purchased a strip of one portion of the partitioned land, and the defendant purchased a strip of another portion. The defendant having erected a house on the land purchased by her of less than the defined cubical content, the plaintiff claimed a declaration that he was entitled to enforce the restrictive covenant against her:—

Held, that the words "the owners or owner for the time being of the remaining hereditaments so agreed to be partitioned as aforesaid" showed a clear intention to annex the covenant to each and every portion of the partitioned land; that the benefit of the covenant ran with each and every part of the land; and therefore that the plaintiff was entitled to the declaration claimed and to an injunction restraining any further breach.

Decision of Luxmoore J. affirmed.

APPEAL from Luxmoore J.

By his statement of claim the plaintiff claimed (1.) a declaration that he was entitled to enforce against the defendant certain restrictive covenants contained in a conveyance dated January 23, 1922; (2.) a declaration that a house erected by the defendant was so erected in breach of a restriction contained in the said conveyance; (3.) an injunction restraining further breaches; and (4.) damages.

The plaintiff was the owner and occupier of certain lands together with a dwelling-house erected thereon situated at Littlestone-on-Sea, with a frontage of 60 feet to Coast Drive, which land was coloured yellow on a certain plan. The defendant was the owner and occupier of a piece of land also fronting Coast Drive which was coloured blue on the plan. Both the plaintiff's and the defendant's land were formerly part of a large piece of land which in 1897 was conveyed to Henry Thomas Tubbs in fee simple and was vested in him immediately prior to his death.

By his will dated March 10, 1915, the said Henry Tubbs devised and bequeathed all his estate and effects unto and to the use of Louisa Elizabeth Tubbs, Samuel Bardsley Mayall, George Dodds Perks, and Frank Harvey Urry upon trust to sell the same and hold the proceeds upon the trusts therein mentioned, which were (shortly stated) to divide the proceeds of sale between his children (other than one son) living at his death in equal shares. The testator, who died in 1917 without having revoked or altered his will, left, besides the excluded son, three sons, Edwin Henry Tubbs, Walter Burnell Tubbs, and Percy Burnell Tubbs, and two daughters, Louisa Elizabeth Tubbs and Clara Mary White.

By an order of the Chancery Division in 1921 it was ordered that the testator's said three sons and two daughters should be at liberty to exercise the powers of making partition conferred by the Settled Land Acts so far as regarded the said land at Littlestone-on-Sea.

By an indenture dated January 23, 1922, made between the said parties last mentioned, the trustees of the will and Herbert Walter Johnson it was agreed that the land delineated on the plan annexed thereto and coloured pink, yellow, green, blue and mauve should be partitioned according to a scheme agreed upon in such manner that the lands coloured pink, yellow and green should exclusively belong to Walter Burnell Tubbs, Edwin Henry Tubbs and Percy Burnell Tubbs respectively, and the lands coloured blue and mauve should be retained by the trustees and continue subject to the trust for sale, but so that the proceeds of sale of the lands coloured blue and mauve and the lands until sale should respectively be held upon the trusts in the said will expressed concerning the respective shares of Louisa Elizabeth Tubbs and Clara Mary White, and reciting that as part of the said scheme of partition it was agreed that all the lands so agreed to be partitioned should thenceforth be subject to the restrictions and stipulations set forth in the first schedule thereto, it was witnessed that the parties thereto of the first five parts in exercise of the powers conferred by the Settled Land Acts and of the said order conveyed to the said Herbert Walter Johnson the land coloured blue and mauve on the plan to hold the same to the use of the trustees and their heirs in fee simple to the intent that the land should continue subject to the trust for sale contained in the will. The indenture further contained the following clause: "And the trustees do hereby for themselves and their assigns to the intent and so that the covenants hereinafter contained shall be binding on the lands and premises hereby assured into whosesoever hands the same may come but not so as to render the trustees or any of them personally liable in damages for any breach thereof after they he or she shall have parted with all interest in the respective premises hereby assured covenant with the respective parties hereto of the first second and third parts and other the owners or owner for the time being of the remaining hereditaments so agreed to be partitioned as aforesaid and not hereby assured that the trustees their heirs and assigns will at all times hereafter perform and observe the restrictions and stipulations set out in the schedule hereto so far as they concern the lands and premises hereby assured."

The schedule to that indenture contained (inter alia) the following provision: "No house or part of a house shall be erected upon a plot except of good and permanent building material nor as regards the plots fronting the Coast Drive of less cubical contents than 15,000 feet nor as regards the plots fronting the Dymchurch Road of less cubical contents than 10,000 feet."

By an indenture dated January 23, 1922, and made between the same parties and containing the same recitals as the before-mentioned indenture, the parties of the first five parts in exercise of the like powers conveyed to the said Herbert Walter Johnson the land coloured yellow to hold the same to him and his heirs to the use of the said Edwin Henry Tubbs and his heirs in fee simple freed and discharged from the trust for sale and powers, etc., in the said will but subject to the restrictions set out in the first schedule thereto (whose provisions were identical with those set out above) and the said Edwin Henry Tubbs covenanted for himself and his heirs to the intent that the covenants thereinafter contained should be binding on the lands and premises thereby assured into whosesoever hands they might come to observe the same stipulations and restrictions.

By divers mesne assurances and finally by a conveyance dated January 6, 1933, Norman Mello Fergusson conveyed to the plaintiff a strip or part of the plot coloured yellow on the partition plan.

By a conveyance made in 1932 between the trustees and the defendant a part of the land coloured blue on the partition plan became vested in the defendant, subject, as the plaintiff alleged, to the aforesaid stipulations and restrictions.

The plaintiff alleged that in breach of those restrictions the defendant had erected on part of the land so purchased a house of less cubic content than 15,000 feet, and he therefore claimed the declarations and relief set out at the beginning of this report.

By her defence the defendant denied (1.) that the restrictions applied to the land purchased by her and (2.) that the land fronted Coast Drive.

Luxmoore J. in his judgment said that it was well settled law that, apart from building scheme cases—and the present was not of that class—a successor in title of the original covenantee was only entitled to the benefit of a restrictive covenant under one or other of three heads: first, if the benefit of the covenant was expressly assigned to him; or, secondly, if it appeared that the benefit of the covenant was part of the subject-matter of his purchase; or, thirdly, if on the true construction of the original conveyance the covenant was intended to enure for the benefit of the particular land. It was admitted on behalf of the plaintiff, who had acquired only a part of the land coloured yellow, that his claim could be based only on the third of those heads. To succeed, the plaintiff had therefore to show that, on the true construction of the conveyance containing the material covenant, the benefit of the restriction was intended to enure to each portion of that land. Reading the covenant in the light of the recitals in the deed it was, in his Lordship's opinion, fairly obvious that it was not intended that it should enure only for the benefit of the pink, yellow and green lands so long as they were held by the covenantees; the covenant was intended to apply to land held in severance. The words "the respective parties hereto of the first, second and third parts," who were the sons of the testator, "and other the owners or owner for the time being," could not be intended to provide that those persons must together own the whole of the pink, yellow and green lands, and could only together enforce the covenant, nor could it properly be contended that the covenant was to enure for the benefit of the particular pieces of land coloured pink, yellow and green, so that only those could enforce it who were the owners of the entirety of each piece of the land, for the words used were not, "the owners or owner for the time being of the said pieces of land" but "of the remaining hereditaments so agreed to be partitioned as aforesaid and not hereby assured." Those words showed a clear intention to annex the covenant to each and every portion of the pink, yellow and green land, for the covenant could not be annexed to the whole of the hereditaments as one indivisible entity, inasmuch as they had already been divided. In his view, therefore, the benefit of the covenant ran with each part of the yellow land, and the plaintiff was entitled to enforce it. His Lordship then considered whether the defendant had committed a breach of the covenant, and held that she had. The plaintiff, however, did not now seek an order to compel the defendant to remedy the breach, nor did he ask for damages; but in view of the denial of his right to enforce the restrictions, the plaintiff was justified in bringing the action, and was entitled to the declaration asked for and to an injunction restraining any further breach.

The defendant appealed.

Cleveland-Stevens K.C. and *W. G. H. Cook* for the appellant. Luxmoore J. was wrong in holding that the respondent was entitled to the benefit of the restrictive covenant. It is established by *In re Union of London & Smith's Bank's Conveyance. Miles* v. *Easter* (1) that, apart from building scheme cases, where a vendor on a sale of part of his land takes a restrictive covenant from his purchaser, and later sells a part of the retained land, a subsequent purchaser of that part is not entitled to the benefit of the covenant unless he can establish (*a*) that he is an express assignee of the benefit of the covenant, or (*b*) that it is clear from the language used that the covenant was imposed for the benefit of the particular piece of land. Neither of those conditions is fulfilled in this case. There is certainly no clear indication that the intention was that the benefit of the covenant should attach to a portion of the land. In *Reid* v. *Bickerstaff* (2) Cozens-Hardy M.R. said (3): "The benefit of a covenant capable of being annexed to land, but not expressed to be so annexed, either by the deed containing the covenant or by some subsequent instrument executed by the covenantee, does not pass as an incident on a subsequent conveyance: *Renals* v. *Cowlishaw* (4) and *Rogers* v. *Hosegood.* (5)" A covenant with the owner of land is not the same thing as a covenant with the owner of part of the land.

(1) [1933] Ch. 611.
(2) [1909] 2 Ch. 305.
(3) [1909] 2 Ch. 320.
(4) (1878) 9 Ch. D. 125.
(5) [1900] 2 Ch. 388.

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[They also cited *Kelsey* v. *Dodd* (1) and Norton on Deeds, 2nd ed., pp. 569 et seq.]

G. P. Slade and *Tonge* for the respondent. In each case, as was said by Farwell J. in *Rogers* v. *Hosegood* (2), it is "a question of intention to be determined by the Court on the construction of the particular document, and with due regard to the nature of the covenant and the surrounding circumstances." If the surrounding circumstances and the nature of the covenant are taken into consideration in this case it is clear that the construction adopted by Luxmoore J. is the right one. If the words used are ambiguous they must be taken most strongly against the covenantor: per Bayley J. in *Fowle* v. *Welsh.* (3)

Cleveland-Stevens K.C. replied.

SLESSER L.J. [after stating the facts substantially as above set out, continued:] This appeal arises out of an action by the assign of a covenantee against the assign of a covenantor on a restrictive covenant claiming a declaration that the terms of that restrictive covenant have been broken, and an injunction restraining the defendant from committing further breaches of the covenant.

So far as the law on this matter is concerned I find all that is necessary in the judgment of the Court delivered by Romer L.J. in *In re Union of London & Smith's Bank's Conveyance.* (4) In that case also the defendants, who were claiming the benefit of the restriction, were not the original covenantees. Romer L.J. said this (5): "It therefore becomes necessary to ascertain what person other than the original covenantee is entitled to the benefit of a restrictive covenant affecting land. This question was put to himself by Hall V.-C. in *Renals* v. *Cowlishaw* (6) and the answer was given in a judgment so well known that it is unnecessary to refer to it at length. It is a judgment that has received the approval both of this Court and of the House of Lords, and has always been regarded as a correct statement of the law upon the subject. Stated shortly it laid down this: that, apart from what are usually referred to as building scheme cases (and this is not a case of that sort), a purchaser from the original covenantee of land retained by him when he executed the conveyance containing the covenant will be entitled to the benefit of the covenant if the conveyance shows that the covenant was intended to enure for the benefit of that particular land. It follows that, if what is being acquired by the purchaser was only part of the land shown by the conveyance as being intended to be benefited, it must also be shown that the benefit was intended to enure to each portion of that land. In such cases the benefit of the restrictive covenant will pass to the purchaser without being mentioned. It runs with the land." I agree with Mr. Cleveland-Stevens that, following that decision, it is incumbent upon the present plaintiff to show that, on a proper construction of this conveyance, the benefit was intended to enure to each portion of the land. That is the test which I apply when I come to the consideration of the document. Passing therefore to that indenture we find, after the recitals, that the trustees for themselves and their assigns, and " to the intent and so that the covenants hereinafter contained shall be binding on the lands and premises hereby assured into whosesoever hands the same may come but not so as to render the trustees or any of them personally liable in damages for any breach thereof after they he or she shall have parted with all interest in the respective premises hereby assured covenant with the respective parties hereto of the first second and third parts and other the owners or owner for the time being of the remaining hereditaments so agreed to be partitioned as aforesaid and not hereby assured " and " will at all times hereafter perform and observe the restrictions and stipulations set out in the First Schedule hereto so far as they concern the lands and premises hereby assured." In the first place that is a covenant with the respective parties of the first, second and third parts, that is Mr. Walter Burnell Tubbs, Mr. Edwin Henry Tubbs, and Mr. Percy Burnell Tubbs, who have respectively the land coloured pink, yellow, and green. Here we are concerned principally with the yellow. Therefore this covenant on the face of it is a covenant with these three persons, and cannot be a covenant with the owners or owner for the time being, because of course, at that time, no owners or owner for the time being, other than those three persons, were in existence.

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(1) (1881) 52 L.J. (Ch.) 34.
(2) [1900] 2 Ch. 388, 396.
(3) (1822) 1 B. & C. 29, 35.
(4) [1933] Ch. 611.
(5) Ibid. 627.
(6) 9 Ch. D. 125.

In considering whether these covenants should, or should not, run with the land, or a part, we must have regard to the words "and other the owners or owner for the time being of the remaining hereditaments so agreed to be partitioned." The words "or any part thereof," or the word "any," are absent, and in several of the cases to which we were referred this difficulty did not arise, because there were words apt to cover a part as well as the whole of the hereditament. Here there is this further difficulty that if on Mr. Cleveland-Stevens' view, this has to be read as meaning the owners or owner standing in the shoes of the respective parties with respect to the whole of their interests, three possible constructions may be taken. It may be said on the one hand, and I think this is really the view that Mr. Cleveland-Stevens favours, that in so far as the lands have been already partitioned, and in so far as the deed speaks of the respective parties of the first, second and third parts, this means that the persons must be the owners of the whole of the possession of that particular party, that is to say, that the restrictive covenant could be enforced by any one showing that he owned the whole of the yellow land. But there is this to be observed, that of the whole of the yellow land which Mr. Tubbs at one time possessed through a series of dealings with this land, the amount of land which ultimately came down to Mr. Drake, the plaintiff, became less and less. When Mr. Tubbs, on March 28, 1929, conveyed to the Bangor House & Estates, of the many yellow parcels which he possessed he only conveyed two. When Bangor House & Estates on October 2, 1929, conveyed to a Dr. Fergusson, one of these two disappeared, and Dr. Fergusson only got one of the parcels or pieces of land referred to in the conveyance, and, finally, as I have said, on January 6, 1933, the plaintiff only got a

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strip or part of a plot, and I do not quite know now whether the case is really put for the defendant in this way that the plaintiff could only succeed if he owned the whole of the yellow, or whether he would require to own the yellow, green and pink together. In my opinion such a problem does not arise, because I think that those words are apt to produce a different result. I read the reference to " the owners or owner for the time being of the remaining hereditaments so agreed to be partitioned " as descriptive of the whole of the remaining hereditaments other than the mauve and the blue, and are not definitive of the yellow, green and pink as separate hereditaments. The words " so agreed to be partitioned " mean to give to the owners or owner for the time being of the remaining hereditaments the benefits of the covenant. It is necessary to describe those remaining hereditaments, and they are described by referring back to the recital, which says that the lands were agreed to be partitioned into the colours blue, pink, yellow, green and mauve. I exclude the blue and the mauve because they are not the remaining hereditaments ; they have already been dealt with and described as the lands of the covenantors. Therefore we are left with the green, the pink, and the yellow, and I read the words " of the remaining hereditaments so agreed to be partitioned " as meaning the owners or owner for the time being of the green, pink, and yellow taken together as one area, as one subject of a restrictive covenant. Mr. Cleveland-Stevens has contended that they must be the owners or owner of the whole of whatever that may be. If my view is right that " the remaining hereditaments " mean the green, the pink and the yellow taken together and not separately, then Mr. Cleveland-Stevens' construction of the words is an impossible one, because these lands have already been partitioned, and the owner of the whole cannot there mean the owner of the pink, the green and the yellow taken together, because they are no longer together—they have been partitioned. The natural meaning of the words is that any person who owns any part of the pink, the green and the yellow is " the owners or owner for the time being of the remaining hereditaments so agreed to be partitioned." If that view is right, it follows that the plaintiff is entitled to succeed because he is apparently the owner of a part of the yellow land, and if the yellow, the green and the pink are to be taken as one it follows that any owner of any part of the green, the pink, or the yellow, may have the benefit of these restrictive covenants. Even without the use of the words " or any part thereof," I think that the thing is itself sufficient to give to the owner of a part the benefit of this covenant. We were pressed by Mr. Cleveland-Stevens to say that it was not right to read the covenant otherwise than strictly, and that the absence of the words " or any part thereof " ought to lead us to the conclusion that these hereditaments, green, pink, or yellow, as the case may be, must be taken as a whole. I cannot recognize any such compulsion. I recognize, and I accept entirely, what was said by this Court in *In re Union of London & Smith's Bank's Conveyance* (1), that it must be shown that the benefit was intended to enure to each portion of the land, and it is true that it has been held that the use of the words " or any part thereof " may be apt for that purpose; but I cannot read that case as meaning that those words, and those words only, are the sole means by which a conveyance may show that the benefit was intended to enure to each portion. In this case the intention, as gathered from the documents and the recital of the whole history of the case, is clear that the benefit of the covenant was to enure to the owner of any part of the remaining hereditaments, and as the plaintiff was such an owner the learned judge was right in the conclusion to which he came. This appeal must therefore be dismissed.

ROMER L.J. In this case the parties are agreed that in order to succeed in his action the respondent must show that the benefit of the restrictive covenants entered into by the trustees of Mr. Tubbs' daughters was intended to enure to each portion of the land of the covenantees. The question for us therefore is purely one of the construction of the particular covenant. Before dealing with it, however, it is right that the particular circumstances in which the covenant was entered

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(1) [1933] Ch. 611.

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into should be borne in mind. The late Mr. Henry Thomas Tubbs was possessed at the time of his death of a considerable quantity of land at Littlestone in Kent. By his will he devised all that land to trustees upon trust for sale, the proceeds of sale to be divisible equally between his five children, of whom three were sons and two were daughters, the shares of the daughters being settled by the will. After his death his trustees disposed of a considerable quantity of the land of which the testator had died possessed, but towards the end of 1921 there remained unsold land of a somewhat unusual shape and position. There was a strip running along the Coast Drive leading from the front part of Littlestone to the high road running from New Romney to Dymchurch, and another strip running from the junction of the Drive with the main road back in the direction of New Romney facing that road. Those strips were roughly 150 feet in depth. That land was not easy to dispose of *en bloc* and so the children agreed to a scheme of partition, obtaining for that purpose from the Chancery Division an order giving them leave to enter into the scheme, the land, in the circumstances of Mr. Tubbs' will, being settled land within the meaning of s. 63 of the Settled Land Act, 1882. The scheme was duly agreed upon, and this long strip of land was divided into twenty-five separate plots, five being coloured pink, five yellow, five green, five blue, and five mauve. The eldest son took the land coloured pink, another son the yellow, and another the green, while the daughters took respectively the blue and the mauve. The partition was carried out by a series of conveyances dated January 23, 1922. I should imagine that each of these plots was, roughly speaking, 200 yards in length, and as part of the scheme it was agreed that every part of the land, the subject-matter of the scheme of partition, should be subjected to covenants restrictive as to the user of the plots. One may reasonably infer, having regard to the situation and shape of these plots, that it was the intention of each child to develop the plot allotted to him or her, not as whole plots but as sites for not very large buildings similar to those with which the south coast is now being so plentifully supplied, and I approach these deeds of conveyance with the

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feeling that the parties probably intended—whether they expressed the intention or not is a different matter—that every small plot into which these larger plots should be divided should be subjected to the restrictive covenants so that there should be reciprocity, and the owner for the time being of every one of the small plots into which those larger ones should be subdivided should have the benefit of those covenants. Curiously enough it resembles to some extent, therefore, the cases which have been subjected to a building scheme, although this is not a building scheme. Each conveyance, for the purpose of giving effect to the partition, was dated January 23, 1922, and the particular one with which we are concerned is the conveyance by which there was conveyed to the trustees for the daughters, because the daughters' shares were settled, the lands coloured mauve and blue. The parties to the deed were of course all the children, the trustees and another gentleman. The deed recites the facts I have mentioned and it further recites that as part of the scheme of partition it was agreed that all the lands agreed to be partitioned should be subject to the restrictions and stipulations set out in the first schedule. By the operative part of the conveyance all the children as tenants for life under the settlement which was deemed to exist under the Settled Land Act conveyed to Mr. Herbert Walter Johnson all the plots or parcels of land shown on the plan annexed to the conveyance and thereon coloured blue and mauve respectively to hold to the use of the trustees upon trust for the daughters. Then follows the covenant with which we have to deal. First of all I wish to say this, that, where on a conveyance of land the purchaser enters into a restrictive covenant with the vendor his heirs and assigns or other the owners or owner for the time being of certain land, that is sufficient to show that the restrictive covenant was to enure for the benefit of the land so referred to. The covenant in this case is in these terms: "The trustees"—that is the persons to whom the blue and mauve had been conveyed—"covenant with the respective parties hereto of the first, second and third parts"—those were the three sons—"and other the owners or owner for the time being of the remaining hereditaments so agreed to be partitioned as aforesaid and not hereby assured" that the trustees would observe the covenants contained in the schedule. If I knew no more of the case than is put before my eyes by that particular covenant I should have thought that it was a covenant with the three sons jointly and other the owners or owner for the time being of the rest of the land which had been subjected to the scheme of partition, after there had been deducted the lands coloured blue and mauve, but it is plain that that cannot be its meaning and effect, because the words "and other the owners" suggest clearly that the three sons are the owners of the lands coloured yellow, green and pink. They are not in fact, as we know from the previous recitals in the conveyance. One son was the owner of the land coloured yellow, another son was the owner of the land coloured pink, and another son was the owner of the land coloured green, and, therefore, one is compelled to regard this as a covenant with the three sons and other the owners or owner, not of all the land subject to the scheme of partition other than the blue and mauve, but of each of the several hereditaments the subject-matter of the partition, other than the parts coloured blue and mauve. Directly you are forced to insert such words as these for the purpose of construing the covenant there is a sufficient indication that the benefit of the restrictive covenants was to follow every bit of the land retained by the sons respectively, that could be described as a hereditament. But it may be—and the covenant is certainly capable of this alternative construction—that it is a covenant with one son and other the owners or owner for the time being of the lands belonging to that son, another covenant with the second son and the owners or owner for the time being of the lands belonging to him, and so on. If the covenant with one son had been a covenant with him and the owners or owner for the time being of, say, the land coloured yellow, I think the appellant would be right in her contention.

But the land of a son is not described in the covenant as being of a particular colour on the plan, and I draw a distinction between a case where a covenant is made with a vendor and the owners or owner for the time being of land to which

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a particular description is applied such as the land called Blackacre or the land coloured yellow, and a covenant with a vendor and other the owners or owner for the time being of the lands retained by him. In the one case, in order that an assignee should subsequently enforce the covenant it would be necessary for him to show that he was the assignee of the land so described; but where the benefit of the covenant is with the vendor or other the owners or owner for the time being of the lands retained by the vendor, then if an assignee can show that he is an assignee of land retained by the vendor, he is entitled to enforce the benefit of the covenant. Most of the cases that have come before the Court have been cases where a covenant has been entered into by a vendor for the benefit of, say, the A.B. estate for the time being. There, of course, no intention is shown that the benefit should enure for any particular part of the estate; but where one finds not "the land coloured yellow" or "the estate" or "the field named so and so" or anything of that kind, but "the lands retained by the vendor," it appears to me that there is a sufficient indication that the benefit of the covenant enures to every one of the lands retained by the vendor, and if a plaintiff in a subsequent action to enforce a covenant can say: "I am the owner of a piece of land that belonged to the vendor at the time of the conveyance," he is entitled to enforce the covenant. For these reasons it appears to me that Luxmoore J. arrived at a right conclusion, and that this appeal fails.

GREENE L.J. I agree. The question involved is a pure question of the construction of a particular document considered in relation to very special surrounding circumstances. It is whether on the true construction of the conveyance the benefit of a restrictive covenant is annexed to land as a whole or to the whole of this land. The words which in this document point out the land for the benefit of which the covenant is taken are these: "and other the owners or owner for the time being of the remaining hereditaments so agreed to be partitioned as aforesaid

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and not hereby assured." It is to be observed that the whole frame of the covenant aims at a compression of language beyond the competence apparently of the draftsman; but I cannot accept the view that, because the language used is difficult to construe, the Court must construe it in a way favourable to the covenantor. The function of the Court is to say what is the true meaning of the language used, however difficult and however obscure that language may be.

The words to which I have referred as pointing out the land in respect of which, and for the benefit of which, the covenant is taken are what may be described as residual words. I am unable to construe them as meaning either the particular coloured acreage going to a particular son in reference to the covenant with that son, or as referring to individual plots of a particular colour, or the sum of such individual plots. The draftsman has used language apt to cover all the hereditaments which were not assured by the deed in question, that is to say, the aggregate of the land subject to the partition agreement, less the particular blue and mauve lands which were being dealt with by this particular document. There are two familiar methods of indicating in a covenant of this kind the land in respect of which the benefit is to enure. One is to describe the character in which the covenantee receives the covenant. That is the form which is adopted here, a covenant with so and so, owners or owner for the time being of whatever the land may be. Another method is to state by means of an appropriate declaration that the covenant is taken "for the benefit of" whatever the lands may be. In the present case, if I am right in construing this clause as a residuary description of all the lands subject to the partition agreement, other than those comprised in this particular document, the meaning of the words used may be paraphrased as follows, and when I say that it is a paraphrase I mean no more than this, that this is what in my opinion the words properly mean: "this covenant is taken for the benefit of all the hereditaments comprised in the partition agreement other than those hereby assured, and may be enforced by the owners or owner of those hereditaments for the time being." That appears to me to be the true meaning of the language used. If that be so it seems to be impossible to construe the reference to the remaining hereditaments as indicating an intention on the part of the covenantors and the covenantees that the only persons entitled to enforce the covenant should be those who at any given moment owned the entirety of those remaining hereditaments. The effect of that construction would be that the only persons who could enforce this covenant by the trustees would be the three sons as owners of, and so long as they owned together, the whole of the rest of the estate. It would be quite impossible so to construe the words " the remaining hereditaments " in relation to this very special transaction. Some construction must be placed upon the words in the context which will at the very least give to each son the right to enforce the covenant as owner of what he receives under the partition. If the words " the remaining hereditaments " include such portions of remaining hereditaments as arise on one severance, namely, the severance effected by the partition among the three sons, it appears to be quite impossible to say that the words do not include all portions of such residue which will arise on any severance. In other words, if a son is entitled to say that within the true meaning of this covenant he falls within the definition, or, that the land which he takes on partition is land to which the benefit of the covenant was annexed, it must necessarily follow that any holder of any portion of the land indicated is also entitled to say that the covenant enures to his benefit.

Returning to the question as I formulated it at the beginning of this judgment, the area of the land pointed out as being the land to which the benefit of the covenant is to be annexed is not on its true construction to be taken as that land as a whole, because if it were so construed it would mean, as I have already pointed out, that the only persons who the moment after this partition was carried through could have enforced the covenant would have been the three sons together. What I think the covenant means is not that it is to be annexed to the land, that is, all " not hereby assured," as a whole, but to the whole of the land ; and the effect of that is that not only

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can each son, in respect of what he gets out of the partition and every part of what he gets out of the partition, enforce the covenant, but every owner for the time being of any part of the hereditaments so comprehensively described is entitled to enforce it. I am quite unable to accept the view that where the intention is to annex the benefit of a covenant to land in such a way that it can be enforced by the owner of any part of it, it is necessary to have some form of words such as " the land and every part of it " or something of that kind. It may very well be that in some contexts, and in the use of certain phrases, the only way in which the desired result can be obtained is by introducing such words as " and every part thereof." In this document, executed in very special circumstances for the purpose of carrying out a very special scheme, and using indeed very special language, I find myself able without hesitation to come to the conclusion that the intention is sufficiently clearly expressed to produce the result which I have indicated. I agree therefore that the appeal should be dismissed.

Appeal dismissed.

Solicitor for appellant: *Arthur C. Dowding.*

Solicitors for respondent: *Braikenridge & Edwards, for Urmston, Case & Roper, Maidstone.*

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Feb. 5, 11, 12; *March* 11.

[1934. J. 1427.]

Copyright—Dramatic Work—Performance at a Women's Institute—"In public"—Infringement—Copyright Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 46), *s.* 1, *sub-ss.* 1, 2; *s.* 2, *sub-s.* 1.

On February 23, 1933, a play was performed by a dramatic society at a monthly meeting of the Duston Women's Institute without the consent of the owner of the copyright, who brought this action for infringement of the copyright. The Women's Institute was one of a large number founded under the rules of the National Federation of Women's Institutes and consisting of voluntary associations of country women formed to improve conditions of rural life and to provide opportunities for mutual help and intercourse. There was an annual subscription of 2*s.*, and monthly meetings of an educational or social nature. The village of Duston contained 1085 females, of whom 109 were members. At the meeting when the performance took place sixty-two members were present; but, apart from the five performers, there were no guests, it having been made a condition of the performance that no guests should be present:—

Held, by the Court of Appeal, that the performance was a performance "in public" within the meaning of s. 1, sub-s. 2, of the Copyright Act, 1911, and therefore that it constituted an infringement of the plaintiff's copyright. Although the audience was limited to members of the institute, all the adult women of the village could be members, and the mere fact that the audience resided in the same village in different houses was not sufficient to make it a domestic or quasi-domestic audience.

Decision of Crossman J. [1935] Ch. 703 reversed.

Duck v. *Bates* (1884) 13 Q. B. D. 843 and *Harms (Incorporated), Ld., and Chappell & Co.* v. *Martans Club, Ld.* [1926] Ch. 870; [1927] 1 Ch. 526 considered.

APPEAL from a decision of Crossman J. (1)

The facts, which are fully stated in the judgment of Lord Wright M.R., were briefly as follows:—

The plaintiff was the author of and owner of the copyright in a play called "The Rest Cure." The defendant was president of the Overstone and Sywell Dramatic Society, and on February 23, 1933, at a monthly meeting of the Duston Women's Institute held in the village hall at Duston, she caused or authorized a performance of the play without the plaintiff's consent. The Duston Women's Institute was formed under rules laid down for women's institutes by the National Federation of Women's Institutes. In a handbook issued by the National Federation it was stated that a women's institute was a voluntary association of country women formed to improve conditions of rural life and to provide opportunities for mutual help and intercourse. Under the Women's Institute Constitution and Rules as set out in the handbook members paid an annual subscription of 2*s.*, and monthly meetings of an educational or social nature were held at a time and place decided on by the members. Provision was made that an institute, on the rules being signed, became affiliated to the National Federation and to the County Federation of the county where the institute was situated. There were in May, 1933, 4878 institutes in existence, and the number had since increased to over 5000. The Duston Women's Institute had 109 members and the female population of the village was 1085. At the meeting when the performance took place sixty-two members were present but no guests except the five performers, it having been made a condition of the performance that only members should be present.

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(1) [1935] Ch. 703.

The plaintiff claimed a declaration that the performance was a performance in public within the meaning of the Copyright Act, 1911, and constituted an infringement of the plaintiff's copyright.

Crossman J. held on a careful consideration of the facts and bearing in mind *Duck* v. *Bates* (1) and *Harms* (*Incorporated*) *and Chappell & Co.* v. *Martans Club* (2), that the performance was a quasi-domestic and not a public affair and therefore that the plaintiff's action failed.

The plaintiff appealed. The appeal was heard on February 5, 11 and 12 and judgment given on March 11, 1936.

Schiller K.C. and *Macgillivray* for the appellant. There was here an infringement of the plaintiff's copyright as defined in s. 1, sub-ss. 1 and 2, of the Copyright Act, 1911. It was not till the Act of 3 & 4 Will. 4, c. 15, that a copyright

(1) 13 Q. B. D. 843.

(2) [1926] Ch. 870; [1927] 1 Ch. 526.

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was conferred in respect of dramatic works. Until then the author had to rely on his rights at common law. There are in this country over 5000 women's institutes with an average membership of about sixty, and it would therefore be a very serious loss to authors of plays, if their plays could be performed at these institutes without obtaining the author's licence to do so. The federation's objects are essentially of a public nature, and each institute is a part of the main body. It would be quite improper to describe one of these institutes as domestic and private. It is part of a national body consisting of about 300,000 persons. The question for decision is what is meant by "performances in public." "Public" means all that is not private and domestic.

The performance in this case was "in public" and not a domestic or quasi-domestic performance such as there was held to be in *Duck* v. *Bates.* (1) That was a border-line case and decided under an earlier Act. It is an extreme decision which is hard to understand. There the performance was given to nurses at a hospital and the audience might be said to consist of persons under one roof. But that is not so in the present case. This case rather resembles *Harms* (*Incorporated*), *Ld., and Chappell & Co.* v. *Martans Club, Ld.* (2), where reference was made to passages from the judgment of Brett M.R. in *Wall* v. *Taylor.* (3) The question is not whether the performance was at a place of public entertainment, as it seems to have been in *Duck* v. *Bates.* (1) The question there was under an Act in which the words "in public" did not occur, but it was treated as implied. The question here is not the same as that which arose in *Harms'* case (2), because there Martans Club were being sued, which had obviously given a performance in public. But *Duck* v. *Bates* (1) shows that for a performance to be in public it need not be open to the public at large. It is sufficient that there should be a portion of the public to whom the performance is given. It is only if the performance is "domestic" in character that it is not an infringement of copyright within s. 1, sub-s. 2, of the Copyright Act, 1911.

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(1) 13 Q. B. D. 843.

(2) [1926] Ch. 870; [1927] 1 Ch. 526.

(3) (1883) 11 Q. B. D. 102, 106, 107.

Here the audience was a collection of members of the institute, and therefore consisted of a section of the public bound together by ties of a public nature. Outside independent people came to give a performance to a section of the public, and the performance was therefore in public: see per Bowen L.J. in *Duck* v. *Bates*. (1) There was no element of domesticity to affect the view that the performance was in public. Here any woman of the village could become a member of the institute on payment of 2*s*., and it could not be said that a performance to a village audience was not a performance in public. [They also referred to *Performing Right Society, Ld.* v. *Hawthorns Hotel* (*Bournemouth*), *Ld.* (2)]

J. V. Nesbitt (*J. M. Gover K.C.* with him) for the respondent. The actual decision in *Duck* v. *Bates* (3) is not very material, but it shows that the contrast in such cases as these is between a public and a domestic or quasi-domestic entertainment. In *Harms'* case (4) the performance was held at a club of a social nature, and there were a large number of persons present. Here the audience consisted exclusively of persons associated together for the purpose of rural improvement, and the question is whether a performance to sixty-two members of this village institute with no guests present can be called a performance in public. It is not an institute where there are recurring performances. There was only one in the year in question and none in 1931. Further no payment was made for admission to the performance and the performers were not paid for their services. It is clear that in *Duck* v. *Bates* (3) the Court of Appeal considered that there could be performances to clubs which were not given in public; and if so, it is hard to think of a case where the performance to such a gathering could be more of a domestic nature than the present. The Court is not entitled to take into account the existence of a large number of women's institutes. The question is whether this particular performance was "in public." It is a question of fact whether a performance is in public, and every element which the authorities had laid

(1) 13 Q. B. D. 849, 850.
(2) [1933] Ch. 855.
(3) 13 Q. B. D. 843.
(4) [1927] 1 Ch. 526.

down as being material to show that a performance is in public is absent in this case.

A. J. Irvine held a watching brief for the League of British Dramatists.

Cur. adv. vult.

March 11. Lord Wright M.R. This appeal raises a question on the words of s. 1, sub-s. 2, of the Copyright Act, 1911, which gives the owner of copyright in a dramatic work the sole right of performing the work or any substantial part thereof in public. The appeal turns on the meaning and effect to be given on the facts of the case to the words "in public."

The facts are not in dispute. The plaintiff is the authoress and owner of copyright in a play in one act first produced in London in 1914 and entitled "The Rest Cure." The defendant is the president of the Overstone and Sywell Dramatic Society, who gave a performance of "The Rest Cure" on February 23, 1933, at the Duston Women's Institute. As this performance was without the plaintiff's licence it is complained that it constituted an infringement of the plaintiff's copyright. The defendant says that the performance was not in public.

The Duston Women's Institute was formed under the rules of the National Federation of Women's Institutes, which represents the union of all Women's Institutes in England and Wales, in pursuance of a movement that was started in Great Britain in 1915; there are now in England and Wales more than 5000 institutes with an average membership of about sixty. Each institute is a separate and independent body, though the federation has in certain events the power to dissolve an institute, and prescribes a general body of rules to regulate the formation of institutes, and each member of an institute is required to sign a declaration to pay (inter alia) an annual subscription and to conform to the rules laid down by the federation.

The general function of the institutes is to hold monthly meetings of a social or educational nature, in particular to encourage music, drama and dancing. Every female inhabitant above a certain age in the village in which an institute is formed is expressly or tacitly invited to become a member.

The Duston Women's Institute had at the material time a membership of 109. Duston is a village on the outskirts of Northampton, about two miles from the centre of the town. It has a population of about 2095, of whom 1085 are females, though the adult female population is not stated.

The meeting on February 23, 1933, was a regular monthly meeting; it took place in the village institute or village hall; the Women's Institute had acquired the use of this hall for its monthly meetings. There were present on that occasion sixty-two members. No charge was made for admission, but each member had paid her annual subscription of 2*s.*, and there was also what is called an American Sale; this means that members bring with them parcels containing goods worth 3*d.* each, each of which can be purchased by those present on payment of 3*d.*; the aggregate of these sums goes to the institute. At the meeting in question 13*s.* was realized in that way. The proceedings included tea, which was provided by certain of the members, all of whom take that duty in turns; after tea there was, among other things, the performance of "The Rest Cure" and of another play called "Mechanical Jane." The performers were members of the institute of a neighbouring village or villages called Overstone and Sywell. The performers received no fee, but gave the performance as a return for some services rendered to their institute by the president of the Duston Institute. They made it a condition that no one should be present save members. They made this condition because a circular had been sent round by the federation to the institutes, advising that the presence of visitors (in which category was to be included members from a neighbouring institute, or the lecturer if not a member of the particular institute) changed the character of a performance from a private to a public one. It was immaterial that no charge was made for admission. The circular advised that royalties must be paid on performances

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given at group conferences, council meetings, exhibitions, etc. At monthly meetings at which no visitors were present the performance, it was advised, was a private performance of a purely domestic character on which no acting fee need be charged. As no visitors were present at the performance in question, except the performers, the defendant claimed that the performance was not " in public."

Performing right, to use a name commonly given to that aspect of the copyright in a dramatic work, was in this country the creation of 3 & 4 Will. 4, c. 15, s. 1, which gave to the author " the sole liberty of representing, or causing to be represented at any place or places of dramatic entertainment whatsoever, in any part of the United Kingdom .... or in any part of the British Dominions." This section did not contain any limitation to public performances. In *Duck* v. *Bates* (1) Fry L.J., in dissenting from the majority of the Court of Appeal, based his judgment on the view that no such limitation could be imported. Brett M.R. and Bowen L.J. accepted the view that what was meant was performance in public. This had already been held by Wilde C.J. in *Lee* v. *Simpson.* (2) The Act of 1911, while leaving out the words " place of dramatic entertainment " expressly defined the author's right as the sole right of performing in public.

In considering the question now before the Court, it is natural to repeat the words of Bowen L.J. in *Duck* v. *Bates* (3) : " We have to construe a statute which it is not easy to interpret : the subject matter is difficult and the words used are vague." The Act of 1911 gives no definition of the words " in public." These words are also used in s. 2, sub-s. 3, and in s. 4, but neither of these latter sections seems to give any help in this connection. It has been said more than once that it is a question of fact whether any particular performance is in public or not. But that expression is not in a strict sense correct. Bowen L.J. (4) thus qualifies it : " The question must be to a certain extent a question of fact." The question, in my opinion, must involve both law and fact, law in the sense that the true meaning of the words "in public" must be ascertained as matter of law, and fact in the sense that it must be determined whether the facts of the case do or do not fall within that meaning. Opinions may differ whether the conclusion is properly described as one of law or one of mixed fact and law.

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(1) 13 Q. B. D. 843, 850.
(2) (1847) 3 C. B. 871.
(3) 13 Q. B. D. 849.
(4) Ibid. 850.

Such authorities as there are do not seem very precise in defining the meaning of the words "in public"; it is certainly difficult and perhaps impossible to define the precise borders of the territory which they cover. "The public" is a term of uncertain import; it must be limited in every case by the context in which it is used. It does not generally mean the inhabitants of the world or even the inhabitants of this country. In any specific context it may mean for practical purposes only the inhabitants of a village or such members of the community as particular advertisements would reach, or who would be interested in any particular matter, professional, political, social, artistic, or local. In the case of a dramatic work the public may be regarded as including persons to whom the drama appeals, but that again must be limited by local and other conditions. Thus it is clear that by "public" is meant in the words of Bowen L.J. "a portion of the public." The particular portion of the public which is meant may sometimes be very small indeed. In *Duck* v. *Bates* (1) the number of persons present at the dramatic performance was about 170. In *Harms (Incorporated) and Chappell & Co.* v. *Martans Club, Ld.* (2) the number present was about 200. In *Performing Right Society, Ld.* v. *Hawthorns Hotel (Bournemouth), Ld.* (3), the number present is not stated, but it was, it seems, much less than either of these numbers. In the first of these cases, the performance was held not to be in public; in the two last it was held to be in public. Thus mere numbers cannot be the test. In *Duck* v. *Bates* (1) the distinction was expressed to be between a public and a domestic or quasi-domestic performance, and Brett M.R. (4) defines a public representation as a representation to which any portion of the public are freely admitted either with or without payment. In that case the dramatic representation was given to nurses and attendants of a hospital, together with the medical men and the students and the families of some of the medical men. The performance was gratuitous. The majority of the Court of Appeal (Brett M.R. and Bowen L.J.) were obviously glad for reasons of sympathy to come to the decision that it was a domestic (or quasi-domestic) and not a public performance, presumably because the audience was in the main composed of the nurses who lived together at the hospital, but they clearly regarded it as a border-line case. Bowen L.J. emphasized the distinction between that case and " a performance to which the public or any portion of the public are invited " ; he added that the question must be largely a question of fact. Earlier in the judgment he said : " Some domestic or quasi-domestic entertainments may not come within the Act " ; then he adds : " Suppose that a club of persons united for the purposes of good fellowship gives a dramatic entertainment to its members ; I do not say that the entertainment will necessarily fall within the prohibition of the statute." He seems to imply that such an entertainment would not generally be domestic or quasi-domestic.

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(1) 13 Q. B. D. 843, 850.
(2) [1927] 1 Ch. 526.
(3) [1933] Ch. 855.
(4) 13 Q. B. D. 848.

This rather cryptic and non-committal expression was considered in *Harms'* case (1), where the performance was at the Embassy Club, a proprietary club in London. Members of the club and some guests were present ; the members were subscribers, an object of the club being the provision of dance music, which was an amenity included in the subscription ; any suitable person was invited to become a member of the club. It was held in that case that the plaintiff's copyright was infringed. Sargant L.J. said (2) : " there has been an invitation to the members of the public capable of becoming members of the club upon the terms of getting in return for their subscription the performance of music, so that you do really get an invitation to the public, and an invitation to the public to listen at a price or at a payment,

(1) [1927] 1 Ch. 526.

(2) Ibid. 537.

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though the payment is an annual one. Beyond that, there is of course this, that the members of the public who have become members of the club by passing through the not very severe test which is imposed, have also the privilege of bringing in other members of the public upon whom no test is imposed, who happen to be their friends and are invited on any particular evening." The Court of Appeal held the entertainment was not domestic or quasi-domestic. They distinguished *Duck* v. *Bates* (1) as being a case where the audience was limited to nurses and others either living in the hospital or connected with its management and a few friends. There was thus, the Court said, something of the nature of an enlarged family or domestic performance. In the *Performing Right* case (2) Bennett J. held that the performance by the hotel orchestra after dinner was public, because it was open to any members of the public who cared to be guests of the hotel, either by sleeping or dining there.

Thus the broad distinction between *Duck* v. *Bates* (1) and the two later cases seems to be that in the former the audience was limited to a class more or less living under one roof (with some additions deemed immaterial), whereas in the two latter the audience consisted of any members of the public who had accepted the invitation to attend either by becoming members of the club or guests of the hotel. The invitation to attend in either case was held to be to the public, or, rather, to a portion of the public, though the public or portion of the public concerned was definitely limited, in the former case to the maximum possible membership of the club and to an actual possible audience based on the size of the club-room, and in the latter case by the sleeping accommodation of the hotel and the size of the hotel lounge.

In *Duck* v. *Bates* (1) the presence of visitors was not held to render the defendant liable for infringement ; if numbers are to be considered, there is no great difference in the size of the audience in that case and in *Harms'* case (3). In none of the three cases was there profit in the sense of a direct charge

(1) 13 Q. B. D. 843.
(2) [1933] Ch. 855.
(3) [1927] 1 Ch. 526.

for admission (except for guests), though in the two later cases there was indirect profit, because the company which ran the club had the benefit of the members' subscriptions, and the hotel had the benefit of the custom of the audience.

The presence or absence of visitors is thus not the decisive factor, nor does it matter whether the performance is paid or gratuitous, nor is it conclusive that admission is free or for payment, nor is the number of the audience decisive. It may be observed that in this country actions are in general tried in public, and the Court is public, though the number of the public present at any hearing may not be more than half a dozen. Again, an unsuccessful dramatic performance, though freely advertised to the relevant public, may not attract an audience of more than ten or twenty, but is still a public performance. The antithesis adopted by the cases between performances in public and performances domestic or quasi-domestic cannot be said necessarily to depend on these factors either separately or in combination. The true criterion seems to be the character of the audience. If the performance of "The Rest Cure" in the Duston Village Institute had been before an audience of exactly the same women as constituted it in fact, drawn from the village, but they had been brought together by a general invitation or advertisement, all other conditions being the same, it cannot be doubted that it would have been a performance in public. In the actual facts, the audience was limited to members of the institute in the village, but all the adult women in the village could be members, and were invited to be members. Election if desired was, in the absence of special disability, a matter of course. If payment was to be considered, the annual 2*s.* subscription included such performances, and thus corresponded to a small payment for the performance. There was no other qualification for membership except residence in the village, but mere residence in the same village in different homes cannot be regarded as constituting a domestic or quasi-domestic audience. There was nothing like the fact of the hospital as the common home which gave a quasi-domestic complexion to the performance in *Duck* v. *Bates*. (1) Thus it would certainly be a great extension of *Duck* v. *Bates* (1) to apply the decision there to this case; and, as already stated, that case was, in the opinion of Brett M.R. a border-line and extreme case. The words of Bowen L.J. quoted above with reference to a club of persons united for purposes of good fellowship seem to indicate that a dramatic performance given to its members would generally fall within the prohibition of the statute. Furthermore, the institute is a society of a quasi-public character. I treat the Duston Institute for this purpose as a separate body, and in my opinion the character of the performance in question cannot be determined by considering that the institute is in one sense a branch of the National Federation. But that aspect is useful to remember as a warning to the Court that if the performance in question is held not to be a performance in public, the rights of owners of dramatic copyright, copyright in music or copyright in lectures all over the country will be seriously prejudiced: their plays will be liable to lose novelty, and the public demand for performance will be affected: the public appetite will be exhausted. The same is true of musical compositions and of lectures. It is the duty of the Court to protect the rights of authors, composers and lecturers, according to a fair construction of the statute. The Court cannot be influenced by feelings of sympathy for the Women's Institute movement, and must decide the case as if it related to an ordinary village social club open to all village women who chose to take the necessary steps to join, which gave to its members a dramatic entertainment by means of performers from outside, whether amateur or professional. Probably no one would question that the performance was in public if the audience, other circumstances being the same, had been, not sixty-two, but 600, as I suppose in one of the larger villages it might have been. If that were not a performance in public, and might be repeated indefinitely all over the country, the performing right would not be of much value. The quality of domesticity or quasi-domesticity seems to me to be absent. I think such

(1) 13 Q. B. D. 843.

performances are in public within the meaning of the statute.

The case seems to me to be within the principle laid down in *Harms'* case (1) rather than within the principle applied in *Duck* v. *Bates*. (2) With great respect to the learned judge, I have come to the conclusion that the performance in question of " The Rest Cure " was a performance in public.

I think the appeal should be allowed, with costs here and below.

ROMER L.J. The question to be decided upon this appeal is whether a performance of a play called " The Rest Cure " at the monthly meeting of the Duston Women's Institute on February 23, 1933, was a performance in public within the meaning of s. 1, sub-s. 2, of the Copyright Act, 1911.

The Act contains no definition of the words " in public " and in this connection they are probably incapable of precise definition. It can safely be asserted that they mean " not in private," but this does not carry the matter much further without some definition of the words " in private." There are, however, many cases in which there can be no doubt at all whether a particular performance is in public or in private. No one, for instance, can doubt that the concerts given at the Albert Hall are, in general, performances " in public," or that music provided by a man for the entertainment of his guests after dinner or at a reception is performed " in private " ; and I think that the meaning of the two phrases can best be ascertained by considering what is the essential difference between the two performances. The difference material for the present purpose lies, as it seems to me, in this. In the latter case the entertainment forms part of the domestic or home life of the person who provides it, and none the less because of the presence of his guests. They are for the time being members of his home circle. In the former case, however, the entertainment is in no sense part of the domestic or home life of the members of the audience. It forms part of what may be called in contradistinction their non-domestic or outside

(1) [1927] 1 Ch. 526.

(2) 13 Q. B. D. 843.

life. In the one case the audience are present in their capacity of members of the particular home circle. In the other they are present in their capacity of members of the music loving section of the public. The home circle may, of course, in some cases be a large one. The section of the public forming the audience may in some cases be a small one. But this can make no difference, though it may sometimes be difficult to decide whether a particular collection of persons can properly be regarded as constituting a domestic circle. In *Duck* v. *Bates* (1) the Court of Appeal seem to have regarded the nurses and medical staff of Guy's Hospital as forming a domestic circle, and a dramatic entertainment given before them and their guests as a private performance. Bennett J., on the other hand, in *Performing Right Society, Ld.* v. *Hawthorns Hotel (Bournemouth), Ld.* (2), treated, and in my opinion rightly treated, a musical entertainment given to the residents in a hotel, to which any respectable member of the public could obtain admission merely by payment, as a performance in public. Nor, with all deference to those who think otherwise, can I agree that it makes any difference whether the actual performers are paid for their services or give them gratuitously, or whether the performers are strangers or members of the domestic circle. The performers at what is unquestionably a private performance are frequently paid. The performers at what is unquestionably a public performance frequently give their services for nothing. Nor can an entertainment that is private when given by the members of the home circle cease to be private when given by strangers.

I also find some difficulty in seeing why it is material to consider the nature of and the place where the entertainment is given. A private entertainment may be given in a public room. A public entertainment may be given in a private house. The question whether an entertainment is given in public or in private depends, in my opinion, solely upon the character of the audience. Suppose, for instance, that a number of people who are interested in the drama band themselves together in a society or club for the purpose of providing

(1) 13 Q. B. D. 843. (2) [1933] Ch. 855.

by means of their subscriptions the performance before themselves from time to time of dramatic works. This would be something entirely outside their domestic lives, and they would, in my opinion, attend the performances merely as members of the public, and none the less because the section of the public which they represent may be limited by election, the social status of the members, or their capacity to pay a large subscription. I should regard any dramatic performance given before that society as a performance in public.

So, too, in the case of *Harms (Incorporated), Ld., and Chappell & Co.* v. *Martans Club, Ld.* (1), which related to a musical performance in the Embassy Club. Its members were merely members of the public who paid an annual subscription for the purpose (among other things) of having dance music played to them. A performance of music given before them and their guests was accordingly held to be a performance in public. By no stretch of imagination could the audience in that case be regarded as forming a domestic circle. The teaching staff and pupils of a boarding-school might, on the other hand, properly be regarded during the school term as forming a domestic circle, and a musical or dramatic performance given before them might well be held to be a private performance, even though the parents or other relations of the pupils were present as guests. I cannot, indeed, think that a performance which would otherwise have been a performance in private could be turned into a performance in public by the mere presence of some guests. Guests were present at the entertainment that was the subject-matter of the inquiry in *Duck* v. *Bates* (2) to which I have already referred—a case which it must be confessed was somewhat near the line. It is easy to imagine other cases in which it is difficult to say whether they fall on the private or public side of the line. But the present case seems to me quite plainly to fall upon the public side. It is, in my opinion, impossible to regard the audience at the meeting of the Duston Women's Institute on February 23, 1933, as constituting a domestic circle. The women that formed that audience were merely members of the public who were paying 2*s*. a year for,

(1) [1927] 1 Ch. 526.

(2) 13 Q. B. D. 843.

among other things, the privilege of being entertained at intervals of a month or more by a lecture or a dramatic performance or in some other way. The section of the public from which they were drawn was no doubt a comparatively small one, consisting, as it did, of the women residing in the parish of Duston. But this can make no difference. Nor can it make any difference that except in the case of the original members each member had to be elected. As a matter of fact it is plain that any respectable woman residing in Duston who desired to join the institute would have been elected as a matter of course. There is no instance on record of one being rejected. The members were in no way bound to one another by any domestic or quasi-domestic tie. The monthly meeting formed part not of the domestic, that is of the private life of a member, but of her outside, that is to say, of her public life. In all respects that in my opinion are material to be considered her case in no way differs in principle from that of a member of the Embassy Club. The annual subscription to the institute is no doubt a very small one, and there are at present only 109 members. But the question that we have to decide is one of principle and one of great importance to lecturers, authors and composers. For there are about 5000 similar institutes in England and Wales with a total membership of something like 300,000. If performances given before these institutes are private performances the result to the owner of the copyright in the works performed would be serious.

In my judgment, however, such performances are performances in public, and this appeal should be allowed.

GREENE L.J. (1) Upon the view which I take of this case the circumstance that the performance was given by members of a different institute from that to which the audience belonged is immaterial. In my opinion, the performance would equally have been an infringement of the plaintiff's copyright if it had been given by members of the Duston Women's Institute. My reasons for attaching no importance to this distinction will sufficiently appear later in this judgment.

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(1) The judgment was read by Romer L.J.

The question whether or not a performance is "in public" has been referred to as being "to a certain extent" or "largely" a question of fact or even as "a question of fact" simpliciter. I interpret these phrases as meaning that the question whether or not a particular performance is a performance "in public" must depend upon the particular facts of each case. Once the facts are ascertained the question on which side of the line the case falls must, in the case of an undefined expression such as "in public," fall to be decided by the light of the Court's own sense of language with such assistance as may be obtained from the whole context of the Act. In other words, the meaning of the phrase "in public" is a question of law and the question whether the facts when ascertained fall within the words is also a question of law: see, for instance, *Farmer* v. *Cotton's Trustees* (1), per Lord Parker.

It is, I think, important, in approaching the question whether a particular performance is "in public," to bear in mind that by s. 2, sub-s. 1, of the Copyright Act, 1911, infringement is defined by reference to the things the sole right to do which is by the Act conferred on the owner of the copyright. The owner of the copyright is by s. 1, sub-s. 2, given the sole right to perform the work in public, and any person who does this without the consent of the owner infringes his copyright. The question may therefore be usefully approached by inquiring whether or not the act complained of as an infringement would, if done by the owner of the copyright himself, have been an exercise by him of the statutory right conferred upon him. In other words, the expression "in public" must be considered in relation to the owner of the copyright. If the audience considered in relation to the owner of the copyright may properly be described as the owner's "public" or part of his "public," then in performing the work before that audience he would in my opinion be exercising the statutory right conferred upon him; and any one who without his consent performed the work before that audience would be infringing his copyright.

(1) [1915] A. C. 922, 932.

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In the case of dramatic works it is, I think, particularly important to bear in mind the position of the owner of the copyright in relation to the audience. In the performance of a play by amateur actors not only do the actors themselves contribute something to the written word—namely, their own skill in acting and interpretation, but they also derive pleasure and improvement from acting, while the members of the audience derive pleasure from seeing a play acted by their friends. These factors lend a colour of domesticity to an amateur performance given by members of a society or club to fellow members and tend to divert the mind from the more essential issues. If the performance is such that, if given by or on the authorization of the owner of the copyright, it would have been a performance before an audience which, in relation to the owner and in respect of that performance, formed part of his " public," the fact that the performers perform for their own pleasure and improvement and the pleasure of their friends appears to me irrelevant.

On the other hand, where a performance is given by children in their parents' drawing-room or by some members of a country house party to their hosts and fellow guests, it could not be said that the audience is, in respect of that performance, part of the author's " public."

If the case be taken of a lecture in which the distracting features to which I have referred are not present, the point will more clearly appear. If a lecturer makes his living by composing and delivering lectures to an audience wherever he can find one, delivery by him of such a lecture to the members of a Women's Institute (its constitution and objects being what they are) would, in my opinion, be a delivery of the lecture in public. One of the objects of a Women's Institute is to obtain for its members entertainment and education by means of (among other things) lectures: and persons who desire to obtain entertainment and education by means of lectures form the lecturer's " public." The opportunity of hearing lectures is one of the advantages which the members of the Institute enjoy and to obtain which they pay their subscriptions. Now, if a member of a Women's Institute obtained possession of a copy of the lecturer's manuscript and without his consent delivered the lecture to her fellow-members, I do not see how it could possibly be said that such a delivery would not be a delivery in public. It would be a delivery to a body of persons desirous of hearing the lecture who have paid subscriptions with the object, among others, of obtaining that advantage. In the present case the plaintiff makes a living by writing plays and authorizing their performance to audiences desirous of seeing the plays performed. The performers, who happened to be members of a Women's Institute, obtained a copy of a play written by the plaintiff, who has the sole right of authorizing its performance in public. Those performers performed the play before an audience consisting of members of an association formed for the purpose (among others) of obtaining entertainment and instruction by (among other things) watching the performance of plays. The audience comprises persons of all classes and varying means. It cannot, I think, be doubted that if the plaintiff had herself authorized a performance by actors not connected with a Women's Institute before that audience she would have been exercising her statutory right of authorizing the performance of her play in public. If this view be correct, the circumstances that the performers are themselves members of the same or a different Women's Institute and by that fact and by their individual skill add something to the entertainment of the audience and also by acting improve their own minds, appear to me to be quite irrelevant. Once it is appreciated that the wrong of infringement is defined by reference to the statutory right of the owner of the copyright, and that accordingly the question of what the words "in public" means is to be examined primarily in the light of the relationship of the audience to the owner of the copyright and not in the light of the relationship of the audience to the performers, the difficulties in the present case appear to me to be removed. I must not be understood as meaning that the relationship of the performers to the audience is in all cases an irrelevant consideration. It may very well be that in some cases the nature of that relationship is important in deciding the question whether the performance, if authorized by the owner of the copyright, would have been a performance "in public." Thus in the examples which I have given of performances by children or by members of a house party it would not be possible to say that if the owner of the copyright had authorized performances by those performers before those audiences he would have been exercising his statutory right of authorizing performances "in public," notwithstanding that the members of the audiences consisted of what may be described as members of the play-going public. Viewed in relation to those performances by those performers the audiences would not be members of the play-going public but mere gatherings of relations or friends. In the present case the circumstances are quite different, and having regard to the nature of the audience and the objects for which they were present, the particular relationship of the performers to the audience as being members of the same or a different Women's Institute and as giving the performance in part for their own pleasure and improvement, appears to me to be of no importance.

I agree that the appeal should be allowed, with costs.

Appeal allowed.

Solicitors: *Reynolds, Sons & Gorst; Francis & Crookenden; Rubinstein, Nash & Co.*

H. C. G.

ASH AND ANOTHER *v.* HUTCHINSON AND COMPANY (PUBLISHERS), LIMITED, AND OTHERS.

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[1935. A. 438.]

Copyright—Infringement—Conversion—Judgment against author of infringement—Subsequent action against publishers and printers—Effect of judgment—Copyright Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 46), *ss.* 1, 2, 6, 7.

The plaintiff, the author of a book, sued and obtained judgment against D. for infringement of his copyright therein. Subsequently the plaintiff sued the publishers of the infringing work claiming damages for infringement under s. 6 and for conversion under s. 7 of the Copyright Act, 1911. He also sued the printers claiming damages in respect of the printing of the infringing copies :—

Held, (1.) (affirming Farwell J.) that the judgment in the previous action against D. for infringement was, by reason of the rule in *Brinsmead* v. *Harrison* (1872) L. R. 7 C. P. 547, a bar to the present action against the publishers, who were joint tortfeasors with D. in the publication of the infringing work; (2.) (reversing the decision of Farwell J. as to acts committed in August, 1933) that the publishers were liable in damages for conversion under s. 7 of the Copyright Act, 1911, in respect of the issue to the public in August, 1933, of copies of the offending work; (3.) (reversing the decision of Farwell J.) that the printers were liable in damages for infringement in respect of the separate tort of printing the work. The Copyright Act, 1911, gives the owner of the copyright in a literary work the sole right of reproducing the work or any substantial part thereof, and the sole right of authorizing such reproduction. Those rights are separate and distinct, and the infringement of each is a distinct and separate tort.

APPEAL from a decision of Farwell J.

By the statement of claim the plaintiff Ash said that he was the author, and, as from June 7, 1934, the owner of the copyright in "The Practical Dog Book," the plaintiff Mrs. Constance Cicely Courtauld being the legal owner of the copyright in that book from April, 1932, till June 7, 1934, during which period the plaintiff Ash was beneficially entitled thereto.

The first defendants—Hutchinson & Co.—were the publishers, and the second defendants—William Brendon & Sons,

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Ld.—were the printers of a book entitled "The Dog," of which one James Dickie was the author, and which was printed and published in August, 1933. The plaintiffs alleged that "The Dog" was an infringement of their copyright in "The Practical Dog Book," and, further, that the defendants had been guilty of conversion under s. 7 of the Copyright Act, 1911. The plaintiffs therefore claimed (1.) an injunction to restrain the defendants, their servants and agents from infringing the plaintiffs' copyright; (2.) delivery up of all infringing copies; (3.) an inquiry as to damages both by reason of infringement and conversion; and (4.) payment of the amount found due.

At the trial it was admitted by the defendants that "The Dog" was a breach of the plaintiffs' copyright, but they contended that there was no infringement within s. 2, sub-s. 1, of the Copyright Act, 1911, inasmuch as by reason of acts done by the plaintiff Ash on and after October, 1933, it could not be said that what was done by them was done without the consent of Ash, and, further, that inasmuch as the plaintiffs obtained judgment against the author of "The Dog" in respect of infringement they could not be sued in that they were joint tortfeasors with Dickie. They further denied conversion.

Farwell J., in the course of his judgment, said: The defendants in this case undoubtedly committed the tort of infringing the copyright of the plaintiffs when, with the authority of Dickie, they published Dickie's book. In my judgment that was beyond all question a joint tort. The combined action of Dickie authorizing and the defendants printing and publishing the book resulted in the infringement of the plaintiffs' work, and gave the plaintiffs a cause of action against each of those joint tortfeasors or any of them. The plaintiffs elected to sue Dickie in respect of that tort. In my judgment the order which was made in that action giving relief against Dickie constitutes a bar to any action against the defendants here so far as this action claims relief for infringement of copyright. It is the same tort and the same cause of action. The plaintiff cannot sue one of several

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joint tortfeasors, and then, having recovered judgment against him, proceed in separate proceedings to sue other joint tortfeasors. But it does not follow that the plaintiffs are not entitled to sue the defendants for conversion, and, if they prove conversion, to recover damages under that head. That is a different cause of action which is in no sense barred by the action brought against the author for infringement by publication. But to succeed in the action for conversion it is necessary to prove, first, acts which amount to conversion, and, secondly, that those acts were done without the consent of the true owner. In my judgment there is no evidence upon which I can hold, if there was anything amounting to conversion, that it was not done with the consent of the plaintiffs. So far, therefore, the claim for damages in respect of conversion fails because the plaintiffs have not proved their case, and so far as it is a claim for damages for infringement it fails by reason of the judgment in the previous action.

The plaintiffs appealed.

K. E. Shelley (*G. T. Aldous* with him) for the appellants. All copies of the work published and printed by the respondents were infringements of the plaintiffs' copyright, and that entitles the plaintiffs to damages for infringement and damages for conversion under the Copyright Act, 1911. (1)

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(1) Copyright Act, 1911, s. 1, sub-s. 2: "For the purposes of this Act, 'copyright' means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever . . . . and to authorise any such acts as aforesaid."

Sub-s. 3: "For the purposes of this Act, publication, in relation to any work, means the issue of copies of the work to the public. . . . ."

Sect. 2, sub-s. 1: "Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright. . . . ."

Sect. 6, sub-s. 1: "Where copyright in any work has been infringed, the owner of the copyright shall, except as otherwise provided by this Act, be entitled to all such remedies by way of injunction or interdict, damages, accounts, and otherwise, as are or may be conferred by law for the infringement of a right. . . . ."

Sect. 7: "All infringing copies of any work in which copyright subsists, or of any substantial part

The "authorisation" referred to in s. 1, sub-s. 2, of the Act is a right of the owner, distinct from the right to produce, and an invasion of that right is a separate tort. Farwell J. was therefore wrong in holding that judgment in the action against Dickie was, under the rule in *Brinsmead* v. *Harrison* (1), a bar to the present proceedings against the publishers for infringement. *Brinsmead* v. *Harrison* (1) was based upon the proposition that a single act—in that case the detention of a piano—was the work of two wrongdoers. Contrast that case with the decision in *The Koursk* (2), where it was laid down that persons were not joint tortfeasors merely because their independent wrongful acts resulted in one damnum; see also *Goldrei, Foucard & Son* v. *Sinclair.* (3) [He also referred to *Evans* v. *Hulton & Co.* (4) and *Falcon* v. *Famous Players Film Co.* (5)] In any event the publishers are liable in conversion under s. 7 of the Act of 1911 by reason of the wrongful issue of copies of the infringing work to the public. As was said in *Oakley* v. *Lyster* (6) any dealing with goods in a manner inconsistent with the right of the true owner amounts to a conversion where it appears that there is an intention to deny the owner's right or to assert a right inconsistent therewith. There is no irreconcilability between a claim for damages for infringement and a claim for conversion of infringing copies: *Sutherland Publishing Co.* v. *Caxton Publishing Co.* (7) The printers are equally liable in conversion.

Hon. S. O. Henn Collins K.C., H. S. G. Buckmaster, and *R. L. Edwards* for the respondents. Farwell J. was right in holding that under the rule in *Brinsmead* v. *Harrison* (1) the judgment in the action against Dickie was a bar to the present proceedings against the publishers and printers. As is said in 1 Smith's L. C., p. 455: "in tort not only he who does the

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thereof . . . . shall be deemed to be the property of the owner of the copyright, who accordingly may take proceedings for the recovery of the possession thereof or in respect of the conversion thereof."

(1) L. R. 7 C. P. 547.
(2) [1924] P. 140.
(3) [1918] 1 K. B. 180.
(4) [1924] W. N. 130.
(5) [1926] 2 K. B. 474.
(6) [1931] 1 K. B. 148, 153.
(7) [1936] Ch. 323.

wrongful act, but all who aid or counsel, command or procure it to be done are liable as principals; and strictly speaking a joint tort is a tort in which there are several principals but a common wrongful act, that is, in which there is but one injuria. . . . . In such a case, however, there is but one cause of action, the injuria, and there can only be one final judgment upon one cause of action." That statement is clearly applicable in the present case. Furthermore, Farwell J. was right in drawing the inference from the correspondence and the conduct of the parties that the plaintiff in fact consented to what the defendants did. There was consequently no conversion.

Shelley replied.

Cur. adv. vult.

March 18. The following judgments were read:—

Slesser L.J. In this action Mr. Edward Ash, as author, and, from June 7, 1934, owner of the copyright in a book, the "Practical Dog," and the plaintiff Mrs. Constance Courtauld, as legal owner from April 25, 1932, until June 7, 1934, sue Hutchinson & Co. (Publishers), Ld., and William Brendon & Son, Ld., for breach of copyright. By their statement of claim dated March 18, 1935, the plaintiffs claim that a book called "The Dog," of which James Dickie was the author, Hutchinsons the publishers, and Brendon & Son the printers, printed and published in or about August, 1933, and that all copies thereof were infringements of the plaintiffs' copyright. They allege that the defendants by printing and publishing "The Dog" in or about August, 1933, have infringed the copyrights and have been guilty of conversion. The plaintiffs also claim an inquiry as to damages sustained by them by reason of such infringement and conversion, and also an injunction and an order for delivery up.

Although in their defence the defendants denied that "The Dog" was a breach of copyright, by letter dated July 1, 1935, that fact is admitted by both defendants, and was not contested at the trial; but the defendants contended, first, that there is no infringement within s. 2, sub-s. 1, of the Copyright Act, 1911, in that by reason of acts done by the plaintiff Ash on and after October, 1933, it cannot be said that what otherwise might have been said to be an infringement was done without the consent of the owner of the copyright (a necessary ingredient in infringement); and, secondly, they say that inasmuch as the plaintiffs obtained judgment against the author of "The Dog," Mr. Dickie, in respect of the same torts, they cannot now be sued, in that they were joint tortfeasors with Dickie, the plaintiffs having elected to proceed and sign judgment fully satisfying the tort against Dickie and others in an earlier action. They also deny conversion and raise the defence of estoppel; but this latter defence was not argued at the trial.

For the sake of clarity I think it convenient to discuss the various claims and defences, so far as they are pleaded, and to deal with them seriatim—(A) as to the publishers: (1.) the claim for damages for conversion; (2.) the claim for damages for infringement. (B) as to the printers: (1.) the claim for damages for conversion (this claim, for reasons I shall state hereafter, is not raised in the pleadings); (2.) the claim for damages for infringement.

Considering the publishers' case first: The statement of claim in the earlier action of Ash *v.* Dickie and the Daily Sketch and Sunday Graphic, Ld., alleges that the defendant Dickie is the author of and authorized the publication of "The Dog." It continues: "Extracts were published and sold by the Daily Sketch during 1932." The plaintiff Ash claimed an injunction, delivery up and inquiry as to damages sustained by the plaintiff by reason both of infringement and conversion. The defendants denied infringement or conversion.

On October 18, 1933, an application was made to Luxmoore J. in that action by the plaintiff Ash asking for an injunction (at that time the plaintiff Mrs. Constance Courtauld had not been joined as a plaintiff). This was refused, but Mr. Buckmaster for the defendants undertook until judgment to keep an account of all copies alleged to infringe the plaintiff's copyright sold or dealt with by the defendants.

A notice contained in a letter dated November 1, 1933, from Dickie's solicitors to the defendants Hutchinson is not accurate. It states that it was agreed between the parties that the undertaking should be given—W. Shelley denies that he so agreed—and it further states that account should be kept of all copies of the book which may be sold or dealt with by Dickie and the Daily Sketch as appears from the order of the Court. Nevertheless, the defendants Hutchinson agreed with Dickie's solicitors on November 4 to keep an account of all sales as from October 31.

On February 18, 1935, Bennett J. gave judgment in the case of Ash *v.* Dickie. He held that there had been actionable infringement; that Dickie had taken or copied a substantial part of the plaintiff's book, and ordered that there should be an inquiry as to damages by reason of infringement by the defendant Dickie and by reason of the conversion of infringing copies by the defendants the Daily Sketch. He also granted an injunction against Dickie. As regards conversion, no judgment was given against Dickie; and this being a separate cause of action from that of infringement, the one under s. 7 of the Copyright Act, 1911, the other under s. 6: *Sutherland Publishing Co.* v. *Caxton Publishing Co.* (1), I do not think it can successfully be said, even assuming that the defendants Hutchinson and Dickie were joint tortfeasors in the alleged conversion, that the plaintiffs here are precluded from proceeding with their action in conversion against the publishers in the present case by reason of anything which happened in the Dickie action.

But there remains to be considered the effect of the judgment in the Dickie case based on infringement. The allegation, as I have said, in that case was that Dickie had authorized the publication of the book "The Dog." Publication means the issue of copies of the work to the public—s. 1, sub-s. 3, of the Copyright Act, 1911—and must be taken, therefore, to be capable of including all necessary steps to that issue such as printing, and, on the facts of the case, to have included it.

Mr. Shelley argued as a general proposition that the

(1) [1936] Ch. 323.

authorization in s. 1, sub-s. 2, is a right of the owner, separate from the right to produce, to authorize such reproduction; and that the invasion of the right to authorize sale is a separate tort. I cannot take so general a view. The particular nature of the authorization in each case has to be considered. The word "authorise" in the 1911 Act includes any one who sanctions, approves or countenances (per Tomlin J. in *Evans* v. *Hulton & Co.* (1); *Falcon* v. *Famous Players Film Co.* (2)); and, applying that interpretation to the facts of this case, in so far as Hutchinsons, the publishers, acting for Dickie, the author, authorized the printer to print "The Dog," they, in my opinion, could have been joined as tortfeasors in the Dickie action; for the right of the plaintiff to authorize the publishers to publish and so impliedly in their turn to authorize the printers to print is one right, and its invasion, through the authorization of Dickie to the publishers to print and publish, one wrong. The judgment, therefore, against Dickie for damages for infringement is a bar to damages against Hutchinsons in this action for what otherwise might be a wrongful infringement.

The result is that, by reason of the Dickie action, Messrs. Hutchinsons cannot successfully be sued for infringement, but can be sued for conversion; but the only conversion which can be complained of is that pleaded in this action—namely, of wrongful issue of copies to the public in or about August, 1933, and at no later date.

As regards conversion by detention, Mr. Shelley admitted that he has not complained of any act of the publishers in conversion other than publishing in or about August, 1933, which therefore cannot cover a complaint of wrongful detention of books still in possession of the defendants Hutchinsons; so much of the conversion as is based on detinue fails.

Finally, therefore, as regards the publishers, the appeal succeeds to this limited extent: that there must be an inquiry into damages for conversion under s. 7, but such damages for conversion should be limited to copies published and sold

(1) [1924] W. N. 130.

(2) [1926] 2 K. B. 474.

in August, 1933, and no damages should be given for wrongful detention of copies of " The Dog " by the publishers.

On infringement under s. 6 of the 1911 Act, the plaintiffs fail against the publishers by reason of the rule in *Brinsmead* v. *Harrison*. (1)

(B) As to the printers: (i.) the defence of judgment alleged to have been satisfied by the Dickie action. In that action, as I have already stated, the plaintiff obtained judgment on the basis of infringement only. The question arises: Could the plaintiff then have sued Brendons for infringement? The allegation in the statement of claim in Dickie's case that Dickie authorized the publication would have enabled the plaintiff, as I have said, to join the publishers with the author as having authorized by reproduction the publication and printing, but the printers are in a different position. They committed the separate tort of printing, apart altogether from the authorization of printing by the publishers. The injuria which the plaintiffs suffered at their hands is different from the injuria at the hands of the author and the publishers, though the damnum might have been the same: see *The Koursk*. (2)

There is, therefore, no answer to the claim against the printers for infringement based upon the Dickie action; for judgment could not have been obtained against them in that action for the same tort as that for which Dickie and the publishers could be sued. But the damages in such case will have to be proved in the inquiry. On a claim for infringement they can be recovered for loss sustained by the infringement by payment of the profits resulting from the piracy; and the question of sales after October, 1933, will have to be considered.

I think that an undated letter of the defendants' solicitor, in answer to a letter from the plaintiffs' solicitor, of July 2, 1935, admits that, apart from consent, there was a prima facie infringement. The only express allegation of consent in the defendants' pleadings is at the beginning of October, 1933, and thereafter. I read the pleadings, however, to make

(1) L. R. 7 C. P. 547. (2) [1924] P. 140.

it clear that the earliest consent which can be relied upon by the defendants is in October, 1933. There thus appears to be an infringement by the printers without consent in August, though, of course, in the inquiry on infringement as to damages any particular copy of the offending "The Dog" shown to be published with the consent of the author will have to be excluded. In any case, damage due to sales after August, 1933, will have to be shown to be the direct result of publication; that is, as the result of the issue to the public in that month.

(ii.) With regard to conversion by the printers, it is said by the plaintiffs that the printers converted all the copies printed in or about August, 1933, by dealing with them in handing them over to the publishers. As I have already indicated, I do not think that the pleadings sufficiently raise this point. They complain of printing, which supports the claim for infringement, but do not, in my view, raise a plea of parting with the printed matter to the publishers so as to found conversion, nor is there any evidence to show that the printers did so tortiously deal with the copies as to constitute conversion. No other allegation of conversion by the printers can be sustained.

My final conclusion, therefore, of this case is: first, that the appeal should be allowed as against the publishers, and an inquiry as to damages ordered under s. 7 of the 1911 Act for conversion only; such an inquiry being limited to damages directly sustained in August, 1933, by sales of or wrongful dealing with the matter then published. Secondly, as to the printers, the appeal should be allowed, and an inquiry as to damages held with regard only to the infringement by them of the plaintiffs' copyright in August, 1933, upon the principles upon which damages for infringement may be given under s. 6 of the Copyright Act, 1911; the sale of any book not sold without the plaintiffs' consent to be excluded from the inquiry as to damages. In so far as in August, 1933, the copyright was vested in the plaintiff Mrs. Courtauld, she and not the plaintiff Ash is entitled to the inquiry.

The appeal is allowed and the following inquiries directed

(1.) An inquiry as to the damages (if any) suffered by the plaintiff Mrs. Courtauld by reason of the infringement of her copyright in "The Practical Dog Book" committed by the defendants William Brendon & Son, Ld., in printing "The Dog" in the month of August, 1933. (2.) An inquiry as to the damages (if any) suffered by the plaintiff Mrs. Courtauld by reason of the conversion by the defendants Hutchinson & Co. (Publishers), Ld., of copies of "The Dog" by the issue thereof to the public in the month of August, 1933.

Defendants to pay two-thirds of plaintiff's costs of the appeal. Defendants to pay plaintiff's costs of action, save in so far as such costs were increased by the raising of issues other than those on which the plaintiffs have succeeded in this Court; the defendants to have the costs occasioned by the raising of such issues, with the usual set-off. Costs of inquiries reserved, with liberty to apply in the Chancery Division.

ROMER L.J. By the statement of claim in this action the plaintiffs allege that the defendants Hutchinson & Co. are the publishers, and the defendants Brendon & Co. are the printers of a book entitled "The Dog," of which one James Dickie is the author. They further allege that such book and all copies thereof are infringements of the plaintiffs' copyright in a literary work entitled "The Practical Dog Book," and that the defendants and each of them by such printing and publishing have infringed the said copyright and been guilty of conversion. The date assigned by the statement of claim to these alleged wrongful acts is "in or about August, 1933," but Mr. Shelley, on behalf of the plaintiffs, now agrees that the date should be "in August, 1933." The defendants Hutchinson & Co. by their defence admitted that they published "The Dog" in August, 1933, but did not admit that they had infringed the plaintiffs' copyright or been guilty of conversion. In the alternative they alleged, so far as is now material, (1.) that the plaintiffs were precluded from obtaining any relief against them by reason of a judgment obtained by the plaintiffs against Dickie in an action of Ash *v.* Dickie [1933, A. No. 2388]; (2.) that as from some date at or about the beginning of October, 1933, they continued the publication of "The Dog" with the full knowledge and consent of the plaintiff Ash, such plaintiff having been from April, 1932, until June, 1934, the owner in equity and after June, 1934, the owner in law of the copyright in "The Practical Dog Book." The defendants William Brendon & Sons, Ld., in their defence admitted that they were the printers of "The Dog," but denied that they had infringed the plaintiffs' copyright or been guilty of conversion. In the alternative they also relied upon the judgment in Ash *v.* Dickie, and upon the knowledge and consent of the plaintiff Ash as from the beginning of October, 1933, alleging that in printing the book they were acting as agents for and upon the instructions of their co-defendants.

Such were the pleadings themselves at the trial of the action. But before that event took place two letters had been written by the defendants' solicitors to the plaintiffs' solicitors, one being dated July 1, 1935, and one undated, but written a few days later. I need not set out the contents of these letters in full. It is sufficient to say that, in my opinion, upon their true construction they contain and were intended to contain an admission by the defendants that the copies of the book "The Dog" printed and published by them respectively were infringements of the plaintiffs' copyright, and that they intended to rely solely upon the alternative defences to which, so far as now material, I have just referred.

At the trial of the action neither party adduced oral evidence. The position, therefore, was this: The defendants Hutchinson & Co. admitted the publication of infringing copies in the month of August, 1933, and it is conceded by them that publication means, among other things, authorizing the printing.

Now, in the action against Dickie the statement of claim alleged that he was the author of and had authorized the publication of "The Dog," and the judgment against him must have been given in respect of both these wrongful acts. The defendants Hutchinson & Co. in authorizing the defendants Brendon to print must merely have passed on the authority they had themselves received from Dickie, for otherwise they were not in a position to "authorise" the printing. The authorizing of the printing was therefore due to the concerted act and constituted a joint tort on the part of Dickie and the defendants Hutchinson & Co., and the judgment against Dickie in respect of that tort precluded the plaintiffs from recovering against the defendants Hutchinson & Co. in respect of the same tort. But publication also includes the sale and offering for sale of copies to the public, and this would have constituted an infringement of the plaintiffs' copyright if, but only if, the copies had been infringing copies to the knowledge of the defendants Hutchinson & Co.: see s. 2, sub-s. 2, of the Copyright Act, 1911. Such knowledge, however, was neither alleged nor proved, and no relief could be given to the plaintiffs on this head. But, in view of the provisions of s. 7 of the Act, any sales in August, 1933, were a wrongful conversion of the copies sold, whether the defendants Hutchinson & Co. knew or did not know that they were infringing copies. Nor could they avail themselves of either of their alternative defences as affording an answer to the plaintiffs' claim under this head; for Dickie had not been sued for conversion, and the alleged knowledge and consent of the plaintiffs only related to a later period than the month of August, 1933, which was the only period during which conversion by the defendants Hutchinson & Co. was alleged.

In these circumstances I am of opinion that the plaintiffs were entitled to recover damages against the defendants Hutchinson & Co. for the conversion by sale of infringing copies in August, 1933, and that the learned judge should have directed an inquiry to ascertain what such damages were. It is to be observed that conversion by detention was not alleged.

The position of the printers must now be considered. The printing of infringing copies in August, 1933, had been admitted by them, and the plaintiffs were accordingly entitled to succeed in the action against them unless they were precluded from doing so by reason of the judgment in the plaintiffs' action against Dickie. Now, the judgment against Dickie, as I have already pointed out, must be taken to have been founded in part upon the authorizing of the printing of "The Dog." The present action against the defendants Brendons, on the other hand, is in respect of the printing. The tort committed by Dickie, therefore, was the authorizing of the reproduction of "The Practical Dog Book" or a substantial part thereof, while the tort committed by the defendants Brendons was the reproduction itself. By s. 1 of the Act the owner of the copyright in a literary work appears to be given, among other things, rights of which one is the sole right of reproducing the work or any substantial part thereof, and the other is the sole right of authorizing such reproduction. These rights must, I think, be regarded as distinct and separate rights, and the infringement of them as distinct and separate torts. This being so, it is impossible to regard Dickie or the defendants Brendons as joint tortfeasors, and the judgment obtained against Dickie in no way precluded the plaintiffs from obtaining judgment against the defendants Brendons for the tort of printing admittedly committed by them. I am accordingly of opinion that the learned judge should have directed an inquiry as to the damages occasioned to the plaintiffs by the printing of the infringing copies during the month of August, 1933. In ascertaining those damages the tribunal conducting the inquiry must have regard to sales of the infringing copies at whatever date such sales may have taken place, because the damage occasioned to the plaintiffs by such sales would flow naturally from the original tort of printing. It will, however, be open to the defendants Brendons to show, if they can, that the sales in and after the month of October, 1933, were made or must be deemed to have been made with the knowledge and consent of the plaintiffs as alleged in their defence, and the damage occasioned by any such sales will have to be excluded. I am unable to find anything in the statement of claim which would justify any judgment against the defendants Brendons in respect of conversion.

For these reasons I am of opinion that the judgment given by Farwell J. must be discharged, and an order made in the terms that have been stated by Slesser L.J.

Greene L.J. At the trial of the action the plaintiffs' counsel elected to close his case without calling evidence, relying upon admissions in the defences and upon certain correspondence. The defendants' counsel in his turn elected to call no evidence, and he relied upon, among other things, the facts relating to a previous action brought by the plaintiffs against one James Dickie and a newspaper company, as disclosed in the pleadings in that action and the correspondence. A plaintiff who relies for the proof of a substantial part of his case upon admissions in the defence must, in my judgment, show that the matters in question are clearly pleaded and as clearly admitted ; he is not entitled to ask the Court to read meanings into his pleading which upon a fair construction do not clearly appear in order to fix the defendants with an admission.

Certain of the matters which Mr. Shelley, on behalf of the appellants, argued were admitted on the pleadings, cannot, in my judgment, be so treated, and I will first of all eliminate them from the case. They are as follows :—

(1.) Mr. Shelley claimed that in the statement of claim there was to be found an allegation that the printers had been guilty of conversion. He said that the combined effect of the allegations that the printers printed copies of the offending work and that the publishers published the work (both of which allegations are admitted in the defences) necessarily was that the printers parted with the copies of the work to the publishers, and that this amounted to conversion. But it appears to me quite illegitimate to spell out of these allegations any such allegation of conversion, particularly when in para. 3 of the statement of claim the allegation that the defendants were guilty of conversion is based upon the performance by them of the acts set out in para. 2 —namely, in the case of the printers printing and in the case of the publishers publishing.

(2.) Mr. Shelley argued that the allegation that the publishers published the infringing work must be read as including an allegation that they sold copies which to their knowledge infringed the plaintiffs' copyright so as to support a claim under s. 2, sub-s. 2, of the Copyright Act, 1911. The statement of claim cannot, in my opinion, be so construed.

(3.) The allegation against the publishers is that they "published" the infringing work "in or about August, 1933." Founding himself upon the statements in paras. 8 and 11 of the defence of the publishers, Mr. Shelley claimed that it was admitted by the publishers that they had sold copies subsequently to August, 1933; that these sales were acts of conversion, and that, accordingly, the publishers were liable in conversion in respect of all dealings by them with infringing copies whether in or subsequent to August, 1933. In my opinion, the only acts of conversion alleged in the statement of claim against the publishers are acts done in or about August, 1933—which I understand Mr. Shelley to agree is to be treated as meaning August—and it is not open to the plaintiffs to extend their claim by reference to admissions in the defence, even if it be proper to construe these admissions as admissions of acts of conversion.

(4.) Mr. Shelley also claimed that he was entitled to an order for delivery up of all copies remaining in the defendants' hands. In order to support such a claim there must, in my opinion, be an allegation in the statement of claim to the effect that there are copies in the hands of the defendants, and no such allegation is here to be found. Mr. Shelley endeavoured to get over the difficulty by referring to para. 11 of the defence of the publishers, which he said impliedly admitted that they still had copies in their hands, and to certain letters from which he claimed that a similar admission could be extracted. In the absence of the appropriate allegation in the pleadings I am of opinion that this claim cannot be supported.

With regard to all these matters, no application was made either to the learned judge or to this Court for leave to amend the statement of claim, and in my judgment the plaintiffs stand bound by their pleading, and their claims in the action must be limited accordingly.

I now turn to the matters which remain open to the plaintiffs. These are (1.) a claim against the printers for infringement; (2.) claims against the publishers for (*a*) infringement, (*b*) conversion. I will deal with them in order.

(1.) The claim against the printers is based on the allegation that they were the "printers" of the offending work which was printed "in or about August, 1933." This allegation sufficiently states that the printers reproduced the plaintiffs' work or some substantial part thereof in a material form—namely, printed copies. The printers in their defence admit the plaintiffs' copyright, and that they printed the offending work. They do not in terms admit or deny that the copies so printed were infringements, but they do not admit that any acts of theirs constituted an infringement of copyright. Any doubts as to the meaning of the defence were set at rest by an undated letter from the defendants' solicitors to the plaintiffs' solicitors in which it is made clear that the defendants admit that all copies of the offending work are infringements. This admission means that the copies were made without the consent of the owner of the copyright, a matter upon which the plaintiff called no evidence, a course which, in view of the admission, he was entitled to take. Now, this being so, the plaintiff Mrs. Constance Cicely Courtauld is, in my opinion, prima facie entitled to damages for infringement of copyright against the printers. The matters in connection with the former action against Dickie which were relied on as amounting to consent were all subsequent in time to August, 1933, and could, in my judgment, afford no defence to the claim. On the other hand, if and so far as the printers may be able on the inquiry as to damages to show that any sales took place in circumstances that by reason of consent or otherwise precluded the raising of any complaint in respect thereof, those sales must be excluded from consideration in estimating the damages flowing from the act of infringement alleged—namely, printing. As it will be open to the defendants on the inquiry to go into

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the whole matter of such alleged circumstances, I prefer to say nothing upon the question whether the material which was placed before the learned judge and this Court in relation to them was sufficient to establish consent or not.

But there is another defence raised on behalf of the printers. It is said that judgment was recovered against Dickie in respect of the infringement committed by him in authorizing the publication of the offending work. Mr. Henn Collins on behalf of the respondents argued that upon the true construction of the statement of claim in the action against Dickie the allegation that Dickie " authorized the publication " must be read as including an allegation that Dickie " authorized the publishers to procure or authorize the work to be printed by the printers who in fact printed it." He then says that the real tort lies in the printing, and that Dickie, the publishers, and the printers were joint tortfeasors in the tort of infringement by printing copies, with the result that the judgment against Dickie bars any further action against the publishers and the printers or either of them. This argument, in my opinion, is not well founded. Under s. 1, sub-s. 2, of the Copyright Act, 1911, the rights of the owner of copyright are set out. A number of acts are specified, the sole right to do which is conferred upon the owner of the copyright. The right to do each of these acts is, in my judgment, a separate statutory right, and any one who without the consent of the owner of the copyright does any of those acts commits a tort; if he does two of them he commits two torts, and so on. Now, at the end of the list of acts there is added the words (which must be prefaced by the words " the sole right ") " to authorise any such acts as aforesaid." The statute in terms treats the right to authorize as a separate right, different from the other rights specifically enumerated. It is not, in my humble judgment, correct to say that the words " to authorise any such acts as aforesaid " are mere surplusage. A person may no doubt reproduce a work himself or through an agent, and the word " reproduce " would cover such a case. But he cannot, I think, be said to reproduce a work if he has merely authorized some one else to reproduce it. Similarly in the case of a dramatic work: an author may be said to "perform" his work if he engages the company of actors who perform it; if he merely licensed a performance he could not be said to perform the work. These considerations made it essential that the Legislature should confer the right to authorize as a separate and substantive right, and they are of particular importance when it is remembered that infringement is defined not by an independent catalogue of acts which are to amount to infringement, but by reference to the rights conferred upon the owner of the copyright. The view that authorization is a different tort from the reproduction authorized is, I think, supported by the decisions in *Evans* v. *Hulton & Co.* (1) and *Falcon* v. *Famous Players Film Co.* (2)

In my opinion, therefore, the judgment in the Dickie action is no defence to the present action against the printers.

(2.) (*a*) The case on infringement against the publishers is to be found in the allegation that they published the offending work in or about August, 1933. I have already pointed out that the statement of claim does not cover a claim under s. 2, sub-s. 2. On the other hand, it is conceded by Mr. Henn Collins that the word "publish" in the context includes authorizing or procuring the printing; indeed, he could not well have declined to make this concession, since it was necessary for him to place a similar meaning on the word "publication" in the statement of claim in the Dickie action in order to found his argument relating to joint tortfeasors. Accepting, therefore, this construction of the word "publish," I find an allegation admitted in the defence that the publishers procured or authorized the printing in or about August, 1933, while the undated letter referred to previously contains an admission that all copies of the work were infringing copies. If the matter stood there, there would be sufficient to entitle the plaintiff Mrs. Constance Cicely Courtauld to an inquiry as to damages against the publishers on the infringement claim, subject to this; that upon the inquiry the publishers, like the printers, would be at liberty

(1) [1924] W. N. 130. (2) [1926] 2 K. B. 474.

to prove, if they could, facts relating to sales during any particular period, which would preclude the raising of any complaint with regard to those sales.

My reasons for thinking that the judgment in the Dickie action is no bar to the claim against the printers apply equally in the case of the publishers to the argument that the only tort committed was that of "reproduction," and that Dickie and the publishers were joint tortfeasors therein. But in the case of the publishers there is a further argument based on the rule as to joint tortfeasors, and it is this. In the Dickie action the allegation against Dickie was that he authorized publication, which must, I think, include the allegation that he authorized the publishers to authorize or procure the printers to print. In this action the allegation is that the publishers procured or authorized the printers to print, and it is said that there was one authorization to print in which Dickie and the publishers were jointly concerned, with the result that the judgment in the Dickie action is a bar to this action against the publishers so far as it is based on infringement. In my opinion this argument succeeds. The distinction is no doubt a narrow one, but I think that it is nevertheless sound. When the publishers authorized the printers to print they were merely acting under the authority to that end already given to them by Dickie ; the authorization by them was a derivative, not an original authorization ; and I cannot find any independent tort of authorization committed by them. The action against the publishers, therefore, so far as it is based on infringement, in my judgment, fails.

(2.) (*b*) There remains the claim in conversion against the publishers. The allegation that they "published" includes, I think, an allegation that they issued to the public. As I have already pointed out, it is admitted that all copies were infringing copies. The conversion alleged is in or about August, 1933, so that any consent based on what took place in connection with the Dickie action is irrelevant. Lastly, no judgment in conversion was obtained against Dickie, so that the rule relating to joint tortfeasors does not apply.

The plaintiff Mrs. Constance Cicely Courtauld, therefore, in my opinion, is entitled to an inquiry as to damages suffered by her through the conversion alleged, namely, issue of copies to the public in August, 1933, but is not entitled to any damages in respect of acts of conversion committed after that time.

It will be observed that I have limited the claims for damages to those suffered by the plaintiff Mrs. Constance Cicely Courtauld. The reason for this is that the infringement by the printers and the conversion by the publishers in respect of which inquiries are ordered both took place in August, 1933, at a time when the copyright was vested in the plaintiff Mrs. Constance Cicely Courtauld.

I agree with the order proposed by Slesser L.J.

Appeal allowed.

Solicitors for appellants: *Paisner & Co.*

Solicitors for respondents: *Birkbeck, Julius, Edwards & Co.*

J. S. H.

In re WILLIAMS.

WILLIAMS *v.* TEMPLETON.

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[1935. W. 361.]

Will—Construction—Direction to set aside fund sufficient to produce a specified income "without deduction of income tax"—Effect of direction.

By his will a testator directed his trustees to set aside out of his residuary estate such proportion thereof as should be sufficient to produce a specified income "without deduction of income tax" and to pay that income to his wife during her life:—

Held, that the words "without deduction of income tax" had the same meaning as "free of income tax" and therefore that the sum to be set aside was such a sum as would produce the specified income after income tax at the current rate had been paid.

Decision of Luxmoore J. reversed.

APPEAL from Luxmoore J.

By his will dated January 26, 1922, Frederick Ernest Williams after appointing executors and trustees and making certain bequests devised and bequeathed all his real and personal estate not otherwise disposed of unto and to the use of his trustees their heirs executors and administrators respectively upon trust to sell call in or convert into money his said residuary trust estate or any part thereof and out of the moneys to arise from such sale calling in and conversion to pay his funeral and testamentary expenses and debts and to invest the residue of the said moneys as therein mentioned. The testator then directed the trustees to " set aside out of my residuary trust estate and the investments for the time being representing the same such proportion thereof as shall be sufficient together with any provision in that behalf whether by deed or by will or codicil which may be made by my said wife to provide an income of one thousand pounds (1000*l.*) per annum (without deduction of income tax) and shall pay such income to my said wife during her life" and after her death to hold both the capital and income in trust for the benefit of his adopted daughter Joan Margaret Williams as therein mentioned. And the testator directed his trustees to pay the income arising from the remainder of his residuary trust estate to his wife during her life and after her death to stand possessed of the said estate and the income thereof (subject to the trust in favour of his adopted daughter) on trusts for the benefit of the children or remoter issue of his brother Owen Wyatt Williams as therein mentioned.

After the death of the testator, the trustees took out a summons asking (among other questions) whether the amount to be set aside under the direction in the testator's will was such sum as after deduction of income tax at the current rate was sufficient to produce the clear yearly sum of 1000*l.* or such sum as was sufficient to produce the gross sum of 1000*l.*

Luxmoore J. said that if the provision had been to provide an income of 1000*l.* per annum and there had been no reference to deduction of tax the amount to be set aside would be a

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sum sufficient to produce 1000*l.* per annum gross. Did the fact that there was a reference to deduction of income tax make it clear that the sum to be set aside was a net as opposed to a gross sum? If the words had been "with deduction of income tax" there could not be any question but that the 1000*l.* was a net sum, and the better view was that "without deduction of income tax" was used as the converse of "with deduction of income tax" and therefore that nothing had to be done with regard to such deduction. His opinion therefore was that the sum to be set aside was a sum which would produce by its income a sum of 1000*l.* before any income tax was deducted from it.

The defendant Joan Margaret Williams appealed. The appeal was heard on February 5, 1936.

Topham K.C. and *J. L. Stone* for the appellant. Under the direction to set aside a capital sum sufficient to provide an income of 1000*l.* "without deduction of income tax" and to pay this income to the wife, the sum to be set aside is a sum sufficient to produce a net income of 1000*l.* after income tax has been provided for. The direction has the same meaning as if the words "free of income tax" had been used, otherwise the words "without deduction of income tax" are meaningless. Further, that is the natural meaning of the words used. What the wife is entitled to receive is a net annual sum of 1000*l.* on which income tax has already been paid, so that it can be paid to her without deduction of income tax.

Vaisey K.C. and *W. T. Elverston* for the residuary legatees. The word "without" means here the same as "before" just as "with deduction of income tax" would mean after deduction of income tax. The sum to be set aside is therefore a sum sufficient to produce the amount specified before income tax has been deducted. It is a gross and not a net sum.

[Romer L.J. If I ask for payment of a sum without any deduction, that means that I am to receive the sum free of any deduction that would otherwise be made.]

If I obtain payment of an annual sum without deduction of income tax, it becomes liable to the tax in my hands, and so here the result of the direction to set aside a sum sufficient to produce an income of 1000*l.* without deduction of income tax and the direction to pay that sum to the wife is that, no tax having been deducted, the wife will be liable to pay the tax after she receives it.

R. W. Jennings for the trustees.

LORD WRIGHT M.R. This is an appeal from Luxmoore J., who has given his decision on various matters relating to the construction of the testator's will; but the only question before us has reference to a few words of the will. The will is said to have been difficult in various respects to construe. The testator devised and bequeathed his real and personal estate to trustees upon trust for sale and conversion and to invest the proceeds. He then gave directions as to what was to be done with the trust moneys, and the clause here in question is "and shall set aside out of my residuary trust estate such proportion thereof as shall be sufficient to provide an income of one thousand pounds (1000*l.*) per annum (without deduction of income tax) and shall pay such income to my said wife during her life and after her death in trust as to both capital and income thereof for my said adopted daughter Joan Margaret Williams for her separate use."

The question in issue here is one between the adopted daughter and the residuary legatees. The widow has no interest in this particular dispute, as the testator goes on after directing the payment to her of 1000*l.* per annum without deduction of income tax during her life to provide that she is to have the rest of the income during her life and that the part of his residuary estate producing this income is then to be held in trust for the children of his brother, who are his residuary legatees.

The dispute turns on the meaning of the words "without deduction of income tax" in the place where they occur. The learned judge has stated the question to be whether the 1000*l.* income is intended to be a gross sum or a net sum. He said: "If the provision had simply been to provide an income of a thousand pounds per annum and there had been no reference

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to deduction of tax at all, the amount which would have had to be set aside would be a sum sufficient to produce a thousand pounds per annum gross, and income tax would in the ordinary course have been deducted from it. Does the fact that there is a reference to deduction of income tax make it clear that the testator was directing that the sum to be set aside was what I may refer to as a net sum as opposed to a gross sum? The words with reference to income tax are 'without deduction of income tax.' I think if the words had been 'with deduction of income tax' there could not have been any question but that the thousand pounds was a net sum, and I think, looking at the whole of the will, the better view is that 'without deduction of income tax' is really used as the converse of 'with deduction of income tax,' and that as, 'with deduction of income tax' would direct that something was to be done with regard to income tax, 'without deduction of tax' means that nothing had to be done with regard to such deduction, and my opinion, on the proper construction of this will is that the sum to be set aside is a sum which will produce by its income a sum of a thousand pounds before any income tax is deducted from it." That view gives no effect to the words "without deduction of income tax" and with respect to the learned judge I feel unable to agree. I find that the words "without deduction of income tax" mean that a clear net sum of 1000*l.* is to be available for the widow, and that no deduction of income tax is to be made from it.

In these circumstances I see no ground for giving the words "without deduction of income tax" anything other than the actual meaning of the words, and I hold therefore that it means that the sum of 1000*l.* is to be a clear net sum and not a gross sum. It is a short point, but with deference to the learned judge I think the appeal must be allowed.

ROMER L.J. I agree. Under the clause in question as I read it the trustees are directed to set aside a sum sufficient to produce the income of 1000*l.* per annum and to hold the same upon trust for certain beneficiaries, the first of whom is the widow, to whom they are to pay the annual sum of 1000*l.*

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" without deduction of income tax." Can that mean anything but that she is to receive the net amount of 1000*l.* free of tax? It is said that this construction will lead to inconvenience owing to the variation in the rate of income tax; but that is a matter easily disposed of, as the trustees' duty will be to set aside after one year from the death of the testator a sum sufficient to produce the income required at that time. I think their duty will be to set aside at the end of a year from the testator's death such an amount as will produce the income of 1000*l.* after deduction of income tax at the current rate. If the rate of income tax increases after that date so much the worse for the beneficiary.

GREENE L.J. I agree, and in my opinion the 1000*l.* to be produced by setting aside a capital sum is 1000*l.* not subject to diminution in the hands of the beneficiary by having income tax deducted from it. In other words the phrase " without deduction of income tax " has the same meaning as free of income tax.

Appeal allowed.

Solicitors: *Emmet & Co.*; *Soames, Edwards & Jones*; *Hall, Sich & Jasper.*

H. C. G.

Approved. Colton *v.* Becollda Property Investments Ld. [1950] 1 K. B. 216

CADOGAN (EARL) *v.* GUINNESS.

CLAUSON J.

1936
April 24.

[1935. C. 3871.]

Landlord and Tenant—Building leases for 99 *years—Restrictive Covenants—Application to authority to discharge or modify restrictions—"After the expiration of* 50 *years of the term"—Terms expressed to run from a date before the date of the lease—Period calculated from date of lease—Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 84, *sub-s.* 12.

By the Law of Property Act, 1925, s. 84, sub-s. 12, the power given to the authority named in that section, on the application of any person interested, by order to discharge or modify any restriction affecting land is extended to leaseholds in cases where the term created was one of more than 70 years, but only after the expiration of 50 years of the term, in like manner as if the land had been freehold:—

Held, that to bring the case within the sub-section the period of 50 years must be reckoned from the date of the lease, and not from any earlier date mentioned in the lease as from which the term is expressed to run.

SUMMONS.

The plaintiff was the estate owner in fee simple in possession of a number of houses in Cadogan Square, London, W., subject to building leases, and the defendants were lessees or under-lessees of these houses. The summons was taken out under Order LIV.A, r. 1A, to determine whether on the true construction of s. 84, sub-s. 12, of the Law of Property Act, 1925, any and if so which of the houses in Cadogan Square mentioned in the schedule thereto came within the sub-section. The leases were granted, in pursuance of two building agreements of 1874 and 1876, at various dates between 1885 and 1892; but the bulk of them were expressed to be granted for a term of 99 years from March 25, 1874, and the remainder for a term of 80 years from March 25, 1883.

The defendants had applied to the official arbitrator for an order under s. 84 removing or modifying certain restrictions in the leases. The plaintiff contended that the arbitrator had no jurisdiction to entertain the application, on the ground that in no case had 50 years of the term expired at the date of application on July 31, 1935. The sole question was what was the proper date of the commencement of the term for the purposes of the section. (1)

Fergus Morton K.C. and *P. M. Walters* for the plaintiff. The term of a lease commences when the lease is executed, and not before. These leases were made in pursuance of building agreements executed in 1874, and probably for that reason the terms were expressed in the lease to have commenced on March 25, 1874; but that is merely for convenience in calculating the length of the term. A term of 99 years granted in 1886 and expressed to commence in 1874 would in fact be only a term of 87 years.

The leases vested in the defendants do not come within sub-s. 12 of s. 84 of the Act. The operation of the habendum is merely prospective from the time of execution of the lease. A tenant cannot be made liable for acts done by him before the date of execution of the lease: *Shaw* v. *Kay* (2); *Lewis* v. *Hillard.* (3)

Sidney H. Noakes for the defendants. The period of 50 years mentioned in the Act should be reckoned from the date, March 25, 1874, which is inserted in all this group of leases as the date from which the length of the term, 99 years, is to be calculated. In *Bird* v. *Baker* (4) it was held that the duration of a lease must be computed from the date mentioned in the lease for its commencement. The period of 50 years, part of a longer term of at least 70 years, mentioned in the Act must be reckoned in the same way.

[CLAUSON J. It is not a term of 99 years.]

In any event the parties have agreed to treat this lease as one for 99 years, and although their interests did not arise until a later date, any such question as the length of a portion of the term, such as the period of 50 years mentioned in the Act, should be solved in the same way. The duration of the term and the interest of the lessee are different questions.

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(1) By the Law of Property Act, 1925, s. 84, sub-s. 12: "Where a term of more than 70 years is created in land (whether before or after the commencement of this Act) this section shall after the expiration of 50 years of the term, apply to restrictions affecting such leasehold land in like manner as it would have applied, had the land been freehold."

(2) (1847) 1 Ex. 412.

(3) (1669) Sid. 374.

(4) (1858) 1 E. & E. 12; 28 L. J. (Q. B.) 7.

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Clauson J. By s. 84 of the Law of Property Act, 1925, power is given to a certain tribunal to deal with restrictive covenants in certain circumstances. Primarily the section is directed to giving the authority jurisdiction to deal with covenants affecting freeholds, but it was thought desirable that in some circumstances the authority should have the right to deal with covenants relating to what has been called, perhaps not quite accurately, leasehold land. It was apparently not desired that this jurisdiction should be universal. It is to be confined to interests of a certain length, of which a certain number of years have expired. The sub-section with which I have to deal, sub-s. 12, runs thus: "Where a term of more than seventy years is created in land (whether before or after the commencement of this Act) this section shall, after the expiration of 50 years of the term, apply to restrictions affecting such leasehold land in like manner as it would have applied had the land been freehold."

It is a very common experience that in the creation of leasehold interests the term which is created is expressed to run as from a date anterior to the date of the document which creates the term. It is very common indeed to find a lease in the year 1936 creating a term of 21 years as from December 25, 1935. If in such a lease there is a reference to, let us say, the first seven years of the term, or "of the said term," then for the purpose of calculating which are the first seven years, no doubt, on the true construction of the document, the seven years should be treated as beginning from December 25, 1935, and not from the date, let us say, in March, 1936, when the document was actually executed. But it must be borne in mind that it is not possible by a deed executed in March, 1936, to create a term in such a sense as that it shall bring into existence a term before the date of the execution of the deed. Although it is spoken of as

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(1) 1 Ex. 412.

a 21 years' term, the term in fact is 21 years less the period which elapses from December 25, on which the term nominally begins, to the date of the execution of the deed. That seems to me an obvious proposition. But I am supported in my opinion of its obviousness by referring to *Shaw* v. *Kay* (1)—a decision of the Court of Exchequer consisting of Pollock C.B., Parke B., Alderson B., and Rolfe B.—in which the proposition which I have suggested to be a correct proposition was adopted.

Applying that to the section which I have to construe I have first to discover what is the meaning of a term of more than 70 years. In my view, a term created by a deed in 1936 to begin as from December 25, 1900, for 70 years would not be a term of 70 years. It would be a term of 34 years—namely, 70 less 36 years. And if I were asked in the case of such a term: When do the first 20 years of that term expire for the purposes of applying this sub-section? I should be bound to say that the first 20 years expire in the year 1956 and not in the year 1920, because in 1920 there was no term. That, of course, is perfectly consistent with what I have already referred to, that if in a document a term which, as created is of less than twenty-one years, is spoken of as a term of twenty-one years, beginning as from a date prior to its creation, and there is a clause providing for determination at the end of the seventh or fourteenth year of the term it is perfectly easy as a matter of construction of such a document to say that the seven years according to the obvious intention of the parties is not to run as from the date of the execution of the lease but from the moment spoken of, though inaccurately, as the beginning of the term in the document. But I am construing an Act of Parliament and not a document inter partes, and so far as the Act of Parliament is concerned it appears to me that the construction which I have indicated must be the correct one.

I now turn to the actual problem which I have to consider. Application has been made to the authority under s. 84 to deal with certain restrictive covenants, and a question arises whether, having regard to the terms of s. 84, sub-s. 12, the

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authority has jurisdiction. There are a number of respondents to the present application, their leases all being of such a length as to raise the question, and I will take one example only as typical. It is suggested that the arbitrator had jurisdiction to deal with restrictive covenants in a lease, No. 7, dated January 31, 1888, which was a lease of 52 Cadogan Square by Lord Cadogan for 99 years expressed to run from March 25, 1874. The defendant in whom the lease is now vested is Mr. George Vernon Dale. It will be observed that the term of 99 years was created 14 years after the date as from which it was stated, according to the language of the lease, to begin. In my view, having regard to what I have already stated, that term is not a 99 years' term but a term for substantially 85 years. However, if that were the only point, that is a term of more than 70 years and, therefore, the term comes within the sub-section. But the sub-section only applies after the expiration of 50 years of the term. When do 50 years of the term expire? As I conceive it, by that phrase the Legislature meant when the term has been an existing term for 50 years; in other words, 50 years of the term expires only 50 years after January 31, 1888—which would be 1938. Accordingly in that particular lease the jurisdiction of the authority to deal with covenants in it will arise only sometime in the year 1938. At all events, the jurisdiction is not applicable at present. It is not necessary for me to deal with any of the other leases referred to in the schedule; they are all on the same footing.

On this summons I must declare that, on the true construction of sub-s. 12 of s. 84, none of the houses or other premises mentioned in the second column of the schedule to the summons, demised by the leases stated in the third and fourth columns, were held under such terms or underleases respectively for terms of which, on July 31, 1935, 50 years had expired within the meaning of sub-s. 12.

Solicitors: *Lee & Pembertons; William Sturges & Co.*

H. L. L.

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April 28, 29.

In re RAY'S WILL TRUSTS.

In re RAY'S ESTATE.

PUBLIC TRUSTEE *v.* BARRY.

[1936. R. 170.]

Will—Gift to abbess of convent at time of testatrix's death—Attestation of will by members of convent—Attesting witness elected abbess before testatrix's death—Gift in trust for community—Not invalidated by attestation—Wills Act, 1837 (7 *Will,* 4 *and* 1 *Vict. c.* 26), *s.* 15.

A testatrix, who was a nun in a convent, by her will gave all her property to the person who at the time of her death should be or should act as abbess of the convent. The will was attested by two nuns belonging to the convent, one of whom was subsequently elected abbess and held that office at the time of the testatrix's death:—

Held, that the will did not create a beneficial legacy or gift to the abbess personally, but that the gift was one in trust for, and as an addition to the funds of the community, and was not invalidated, under s. 15 of the Wills Act, 1837, by the attestation of the will by the witness who afterwards became abbess.

ADJOURNED SUMMONS.

The testatrix, Agnes Ray, who died on July 28, 1935, was a nun in a convent at Woodchester. She had a general testamentary power of appointment over a sum of 3000*l.* settled by the will of her father, Brisco Ray, but no other property. Her will, which was dated November 14, 1932, provided as follows: " This is the last will of me, Agnes Ray, of the Franciscan Convent, Woodchester, Gloucestershire, whereby I give all my property to the person who, at the time of my death, shall be or shall act as the abbess of the said convent, absolutely, and I appoint her executrix of this my said will." The will was attested by a Miss Barry and another lady, both of whom at the date of the will were nuns at the same convent. In September, 1934, Miss Barry became abbess of the convent.

The summons was taken out by the Public Trustee, as trustee of the will of Brisco Ray, to determine (1.) whether the gift failed by reason of s. 15 of the Wills Act, 1837, and if so (2.) whether the 3000*l.* passed to the next of kin of the testatrix, or (3.) in default of appointment.

T. A. C. Burgess for the plaintiff.

Hon. Charles Russell for the defendant Barry, the abbess of the convent. When a will gives property to a person who cannot be definitely ascertained at its date, then the Wills Act, 1837, s. 15, can have no application. Here the will shows that the testatrix did not desire to confer any personal benefit on any one, but directed the property to certain ends through the medium of an office-holder: on that point the case is covered by *In re Barclay. Gardner* v. *Barclay* (1), where a similar gift to the Superior of the Jesuit Church in Farm Street, was held by the Court of Appeal, reversing Tomlin J. (as he then was), to be a gift for the benefit of the Church, as the Superior should in his discretion think fit.

I concede that *In re Barclay* (1) was a stronger case than the present one, but there is quite sufficient in the present will to show that that must have been the intention of the testatrix: *Thornber* v. *Wilson* (2); *In re Delany. Conoley* v. *Quick* (3); *Cocks* v. *Manners* (4).

But even if there is not sufficient in the will to constitute a trust for the community, s. 15 of the Wills Act, 1837, has no application to such a case as this, where, if the testatrix had died immediately after the execution of the will, the attesting witness would not have been disqualified: *Thorpe* v. *Bestwick.* (5) In that case the devisee married one of the attesting witnesses, and it was held she was not disqualified.

The disqualification must exist at the moment of the attesting act. The history of s. 15 goes back to the time when the rule was that a devise of realty had to be attested by at least three credible witnesses. There are decisions as to the point of time at which the witness must have been a "credible" witness, but no decision that a witness who was a "credible" witness at the time of execution could thereafter become "incredible."

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(1) [1929] 2 Ch. 173.

(2) (1858) 4 Drew. 350; S. C. 3 Dr. 245.

(3) [1902] 2 Ch. 642.

(4) (1871) L. R. 12 Eq. 574, 585.

(5) (1881) 6 Q. B. D. 311.

Under the Wills Act, 1752 (25 Geo. 2, c. 6), the principle was altered; the will was preserved, but the interest of the witness whose attestation might have destroyed it, was determined.

Sect. 15 of the Wills Act, 1837, should not be construed as destroying the interest of a legatee in such circumstances as under the former law, before 1752, would not have avoided the will.

[*In re Marcus* (1) was also referred to.]

Wilfrid Hunt for the next of kin. I submit that the gift fails, and as the will appoints the defendant executrix, it operates to bring the property subject to the power of appointment into the testatrix's estate; therefore it goes to her next of kin, and not in default of appointment.

On the true construction of the will this is a beneficial gift to the defendant Barry. A gift to whoever may be abbess of a convent is not sufficient, by itself, to establish a trust for the benefit of the members of the convent.

But if the gift is valid as a gift to the community, then the attesting witnesses benefit as members and the case comes within s. 15. In *Thorpe* v. *Bestwick* (2) the attesting witness was not in any way a potential beneficiary; here both of them were so.

Henry Johnston for the persons taking in default of appointment under Brisco Ray's will referred to *King* v. *Denison* (3); *In re Foord. Foord* v. *Conder* (4), and *Irvine* v. *Sullivan*. (5)

CLAUSON J. On November 14, 1932, Miss Agnes Ray made her will. At that time she was possessed of no property except that she had a general testamentary power of appointment over a sum of 3000*l*. under the will of Mr. Brisco Ray, deceased. Her will operates, if full effect can be given to its terms, to exercise that power of appointment and to pass the 3000*l*.

(1) (1887) 56 L. J. (Ch.) 830; 3 Times L. R. 816.

(2) 6 Q. B. D. 311.

(3) (1813) 1 V. & B. 260.

(4) [1922] 2 Ch. 519, 522.

(5) (1869) L. R. 8 Eq. 673, 680.

Before reading the will I will state certain evidence which is admissible as to the circumstances of the testatrix, and which will throw some light on the meaning of certain terms which she uses in her will. It appears from the affidavit of the Public Trustee (who is the trustee of the will which created the power of appointment) that at the date of her will Miss Ray was a nun in a Franciscan Convent at Woodchester, in the county of Gloucester. Her will was attested by two ladies, Miss Barry and Miss Mary Brasier-Creagh, who, at that time, were two other nuns in the Franciscan Convent. One of the attesting witnesses, Miss Barry, was, in September, 1934 (that is, during the testatrix's lifetime, she having died on July 28, 1935), elected abbess of the convent. It appears from the affidavit of Miss Barry that the religious community at Woodchester of which the testatrix was, and of which Miss Barry is, a member, is a community of nuns, about twenty-seven in number, residing there and following the rule of the Third Order of St. Francis. By the constitution of the community, the abbess, with the assistance of an advisory council, but subject to the Bishop, governs the affairs of the community in all respects, and in particular, controls the expenditure, for the benefit of the community, of all property belonging to the community. The abbess is elected from the community by the senior members of the community, and a new abbess is elected every three years, the former abbess, unless re-elected then, resigning. In addition to the abbess, as provided by the constitution of the community, another member of the community, similarly elected, fills the office of vicaress, and in the absence, from any cause, of the abbess, presides over and governs the community; and in particular, in the event of the death of the abbess during her term of office, the vicaress takes the place of and acts as abbess until the election of a new abbess can be held. Those are facts which I am entitled to know before I undertake the task of reading and construing the will.

I proceed now to read the will and see, in the light of those facts, what is the meaning of the terms which the testatrix has used in her will. [His Lordship read the will and continued:]

It is open to a testator, if he thinks proper, to leave a legacy to a person who, at the time of his death, shall occupy the position of an officer of a voluntary society. Provided only that his intention is made plain it is perfectly open to the testator to give to that person—of whose personality he is, of course, ex hypothesi, ignorant—a gift to be his own property, to be at his absolute disposition and under his control, and which will pass, if he were to die after the death of the original testator, to his executors and be used for the payment of his debts. But such a bequest would be a very extraordinary and remarkable bequest to make, because it would be a bequest which would give a personal benefit to some one whose personality is, as I have put it, ex hypothesi unknown to the testator—a very odd gift, but a gift which could be made, and if the words of the will indicate that that is the gift which is being made the Court would give effect to it. Another perfectly lawful form of gift would be a gift of a legacy to the controlling officer of a society in his capacity of officer, to be dealt with as he would deal with other funds with which, as such officer of a voluntary society, it would be his duty to deal. Again, that would be a gift which the Court will recognize as a good gift, subject only to this point, which sometimes causes difficulty, that if the frame of the gift indicates that the legacy is not to be used at once and immediately for the purposes of the voluntary society, but is to be set aside and invested and the income only to be used, the capital being preserved as an endowment of the voluntary society, the Court will not give effect to the gift because it infringes the rule that no gift except a charitable gift is to be a perpetuity, and a gift thus to endow a voluntary society necessarily creates a perpetuity. Another form of gift which would be lawful is a gift to a person who, at the testator's death, occupies the position of an officer in a voluntary society, the gift being for the society expressed in such terms as that it is not to be used as property of the society but is to belong individually to the members of the society. The official's duty, when he gets the fund, will simply be to divide it equally among the members of the society, and what each member receives is his own property, at his own disposal, passing to his executors, and available for his creditors. That is, one would imagine, a very unlikely form of gift.

Assume a legacy is given of 100*l.* to the chairman of a social club for the club. It would not be held that it would be the duty of the chairman to divide that fund up into as many parts as there are members of the club and send the resulting amount to those persons for their own use. Nor do I think that any Court would have much difficulty in holding (having regard, I admit, to the fact that the words used are " for the club ") that the chairman would not be entitled to put the money into his own pocket. It would be the intention, quite plainly I should have thought, for him to add that to the other funds available for the purposes of the club and use it accordingly.

There is an infinite possibility of language being used in such a way that one or other of those possible types of gift may be the type of gift which is intended by a testator. The duty of the Court is, after informing itself of such facts relating to the testator and the persons or institutions mentioned in the will as are, according to well understood principles, admissible, to take the words of the will and to say what is the result of those words, fairly construed, as used in the will.

With these observations I return to this simple will: " I give all my property to the person who, at the time of my death, shall be or shall act as the abbess of the said convent absolutely." One thing seems clear: there is nothing in that gift which would lead one to treat it as falling within the third type of gift which I have mentioned. There is no indication at all that this fund is to be divisible among the members of the voluntary society, spoken of as " The convent," as their own property. Is this, then, a gift to an official to be dealt with as part of the funds which she administers; or is it a gift for her own personal use to whoever may be the person (and the testatrix cannot possibly know) who happens to be occupying the position either of abbess or of acting abbess at the particular moment of the death? I will

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come presently to the consideration of the word "absolutely." But eliminating it for the moment from the will, and reading the gift as merely saying: "I give all my property to the person who, at the time of my death shall be or shall act as the abbess of the convent," I am driven to the conclusion, realizing that, according to the evidence (as the testatrix must well have known), the merely temporary absence of the abbess on business might leave some one behind, the vicaress, who would be acting as abbess of the convent, and that the personality of the legatee is one which is, so to speak, of no importance at all as compared with the office, that this is a gift to the official in respect of her office. That, after all, is only to say that it is a gift to the official as an addition to the funds which it is her office to deal with and administer. In other words, it is a gift to the abbess, qua abbess, for the purposes of the voluntary society, i.e., the convent.

The real difficulty in this case is the use of the word "absolutely." "Absolutely" means free of some fetter in some form. It is suggested that I ought to construe that word to mean that whoever may happen to be the abbess is to have this fund for her own, although it is given to her only in respect of her office, which may be the quite temporary office of vicegerent for the absent abbess. I cannot put such a meaning on the word "absolutely." I think that the word not only means that the recipient will retain the full ownership, for the purposes indicated, of that which is given, but also that she is to be free from any fetter or trust which would bind her to keep the fund intact for the purposes of the community. The legatee is not to be fettered by the idea that the legacy is to be an endowment and to be kept as income producing: the legacy is to go into the funds of the society and to be used without fetter for any purpose for which the funds of the society can be used. That gives a reasonable meaning to the whole will, and such a testamentary disposition, in the circumstances of the case, is exactly what one would imagine would be the disposition intended by the testatrix. In my opinion, the gift is a perfectly good one to the lady who was abbess at the time of the death (that is, to Miss Barry) for the

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purposes of the convent, as part of the property of the convent. The will is attested by the lady who happens to be the hand to receive the gift. She receives it as a trustee only for the purposes of the voluntary society, i.e., the convent. There is a long line of authority to the effect that there would be no objection to the validity of the gift arising from the fact that the trustee who receives the gift attested the will. It is however the fact that the two ladies who were the attesting witnesses were at the time and both are now members of the convent. In so far as they form part of the community, the gift, according to my construction of it, will enure in some sense for their benefit; but does that circumstance afford any objection to the validity of the gift? If it does, it must be because the facts bring the case within the terms of s. 15 of the Wills Act. Those terms are these (I omit immaterial words): "If any person attests the execution of any will to whom any beneficial legacy, interest, gift or appointment of or affecting any personal estate shall be thereby given or made, such legacy, interest, gift or appointment shall, so far as concerns such person attesting the execution of such will or any person claiming under such person, be utterly null and void." I do not see my way to hold that the attesting witnesses here obtained under the will, as I construe it, any beneficial legacy or interest within the terms of that section. The truth is that the gift is a gift to swell a community fund to be administered for the benefit of the community. I do not think it is a correct construction of the section to treat the fact that an attesting witness may, as a member of a community, get some benefit in some shape or form out of the administration of the fund, as amounting to a legacy or gift by the will to such individual member of the community. Accordingly, in my view, the point under s. 15 of the Wills Act fails. The result is that I shall declare, following the terms of clause 1 of the summons, that as to the settled legacy of 3000*l.*, the capital of which the testatrix had power to appoint, in the events which have happened and on the true construction of the will, the first defendant, that is Miss Barry, is entitled to the capital moneys

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as a trustee to hold the same as part of the possessions under her control of the convent in the will mentioned.

Solicitors: *Hobson & Cobbett; Witham & Co.*

H. L. L.

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April 22; *May* 8.

In re COLEMAN.

PUBLIC TRUSTEE *v.* COLEMAN.

[1935. C. 2996.]

Will—Construction—Perpetuity—Discretionary trusts in favour of son and any wife he might marry—Ultimate trusts for son's children at twenty-one—Vested gift—Not void for remoteness.

Under the will of a testator a share of residue given to one of his sons, W. was settled upon discretionary trusts for W. during his life, and after his death upon similar discretionary trusts for any widow W. might leave and for all or any of the children of W., and after the death of such widow, upon trust for the children of W. at twenty-one or marriage, in equal shares:—

Held, that though the discretionary trust in favour of W.'s widow was void for remoteness, as W. might marry a woman who was not born at the death of the testator, the ultimate trust in favour of W.'s children being vested, and not contingent or dependent on the void trust, was valid.

In re Canning's Will Trusts [1936] 1 Ch. 309 followed.

In re Abbott [1893] 1 Ch. 54 explained and distinguished.

ADJOURNED SUMMONS.

The testator, Francis House Coleman, by his will dated July 26, 1918, appointed the Public Trustee, his daughter, E. S. Coleman, and his son, the defendant S. F. Coleman, the executors and trustees thereof, and devised and bequeathed all his real estate and the residue of his personal estate unto his trustees upon trust, after making certain payments thereout, to divide the same equally among his five sons therein named; but as to the share of one of them, Walter Coleman, directed his trustees to retain and invest the same, and to apply the income during the life of the said Walter Coleman upon discretionary trusts for his benefit and that of any wife or children of his, and after the death of Walter Coleman during the lifetime of any widow whom he might leave, upon trust to exercise the discretionary trust in favour of such widow and of all or any of the children of Walter Coleman, or any one or more of such persons, and after the death of such widow to hold the capital and income of the said share upon trust for the children of his said son at twenty-one or marriage in equal shares.

The testator died on October 26, 1919, and his will was duly proved by two of the executors on January 28, 1920, the daughter Elizabeth having renounced probate.

Walter Coleman survived the testator, and died on August 19, 1934, leaving a will which had not been proved. The defendant R. L. James had been appointed administrator pendente lite of Walter Coleman's estate. Walter Coleman left surviving him his widow the defendant Catherine Coleman, and three children, Francis Lloyd Coleman, John Owen Coleman, and Humphrey Coleman.

The plaintiff took out this summons for the determination of the following questions: (1.) whether upon the true construction of the testator's will and in the events which had happened the discretionary trust to take effect after the death of Walter Coleman in favour of any widow he might leave and of all or any children of Walter Coleman failed by reason of infringing the rule against perpetuities or otherwise; (2.) whether the further trust to take effect after the death of such surviving widow of Walter Coleman in respect of the capital and income of the share settled upon him in favour of his children who should attain the age of twenty-one years or being daughters should attain that age or marry failed to any and what extent by reason of infringing the rule against perpetuities or otherwise.

The summons also raised consequential questions, the decision on which does not call for any report.

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Hubert Rose for the plaintiff.

Wilfrid Hunt for the children of Walter Coleman. The gift to the children of Walter Coleman is perfectly valid, as although it follows the intermediate discretionary trust, which is admittedly invalid, it does not depend upon it in any way. The gift is indefeasibly vested in interest, although it may not fall into possession until after the determination of a trust which may be too remote.

[CLAUSON J. You are not claiming any intermediate interest ?]

No. I admit there may be a gap during which the trusts of the income fail; but the gift is vested, and must take effect in possession on the death of Walter's widow.

Neville Gray for a mortgagee of a son's interest adopted this argument.

Geoffrey Cross for the administrator pendente lite of Walter Coleman. The gift to the children of Walter is void for perpetuity. Any gift, even though it be a vested gift, which is " depending or expectant upon a prior limitation which is void for remoteness " is also void. See per Stirling J. in *In re Abbott.* (1) The reason is, as there stated, that the persons entitled under the subsequent limitation are not intended to take unless the prior limitations are exhausted. Here the prior limitation cannot be exhausted, because it can never come into effect.

There is a note of a decision of Eve J. in *In re Benyon-Winsor* (2) which appears to cover the present case.

[CLAUSON J. referred to Gray on Perpetuities, 3rd ed., at pp. 182 and 251.]

The rule originated in earlier cases, and is fully stated by Lord St. Leonards in *Monypenny* v. *Dering.* (3) In that case a series of questions had been stated for the opinion of the Barons of the Exchequer (4), who held that certain limitations were void for remoteness. Upon the case coming again before Wigram V.-C., he directed a further case for the opinion of the judges of the Court of Common Pleas, and they came to a different conclusion on certain points. After discussing earlier cases and particularly *Beard* v. *Westcott* (1), where a case was also sent to the Court of Common Pleas, Lord St. Leonards states the rule thus (2): "Where there are gifts over which are void for perpetuity, and there is a subsequent and independent clause on a gift over which is within the line of perpetuities, effect cannot be given to such a clause unless it will dovetail in and accord with previous limitations which are valid." See also *In re Mortimer. Gray* v. *Gray.* (3)

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(1) [1893] 1 Ch. 54, 57.
(2) 143 L. T. Journ. 178.
(3) (1852) 2 De G. M. & G. 145.
(4) (1847) 16 M. & W. 418.

In *In re Backhouse. Findlay* v. *Backhouse* (4) Eve J. held that the ultimate remainder, though vested, failed, because the previous limitations which supported it were too remote, and that was a case of personalty.

[CLAUSON J. referred to Challis on Real Property, 3rd ed., p. 104.]

I submit that the decision of Eve J. in the above case was a clear decision on the point I am now arguing. Here a life interest to the son's widow would be good, but the discretionary trust in her favour is bad, because it could not be said at any particular moment that there were persons in existence who could deal with the whole property: see *In re Blew. Blew* v. *Gunner.* (5) In *In re Abbott* (6) Stirling J. clearly treated *Monypenny* v. *Dering* (7) as laying down a general rule equally applicable to real or personal estate.

[He referred also to Jarman on Wills, 7th ed., vol. i., p. 324; Theobald on Wills, 8th ed., p. 679; *In re Thatcher's Trusts* (8) and *In re Hewett's Settlement.* (9)]

Wilfrid Hunt in reply. I submit that this gift is not in any way dependent on the preceding gift. It is a pure vested gift to take effect in possession on the death of the widow, whether or not she was a life in being at the time of the testator's death.

[CLAUSON J. How do you deal with the words "or expectant" in *In re Abbott* (6)?]

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(1) (1813) 5 Taunt. 393.

(2) 2 De G. M. & G. 182.

(3) [1905] 2 Ch. 502.

(4) [1921] 2 Ch. 51.

(5) [1906] 1 Ch. 624.

(6) [1893] 1 Ch. 54, 57.

(7) 2 De G. M. & G. 145.

(8) (1859) 26 Beav. 365.

(9) [1915] 1 Ch. 810, 815.

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None of the cases on this point were cited in *In re Abbott.* (1) *In re Thatcher's Trusts* (2) was a case of a contingent gift in remainder on a gift to children who should attain the age of twenty-five. Here there is no contingency attaching to the gift at all. See Underhill on Trusts, 8th ed., at p. 75, where he says: "Take the case of the rule against perpetuities. The object of that rule is to prevent property being made inalienable for a longer period than specified lives in being and twenty-one years after the death of the survivor. Consequently, not only are trusts void which go beyond that limit, but also trusts in remainder to take effect upon their failure—even trusts in favour of living persons."

The principle there referred to does not apply in the present case at all.

Neville Gray. When Stirling J. in *In re Abbott* (1) used the words "depending or expectant," what he really meant was "depending and expectant." So read, his judgment is entirely consistent with all the decided cases. All the authorities referred to by him in his judgment were cases where the ultimate limitations were both "depending and expectant" on the prior limitations. In *In re Hewett's Settlement* (3) Astbury J. went further and referred to "limitations following." It is clear that here the testator intended the ultimate remainder to vest in possession in any event.

Cur. adv. vult.

1936. May 8. CLAUSON J. The testator in this case died on October 26, 1919, having by his will dated July 26, 1918, given his residuary real and personal estate to trustees upon trust for sale and conversion and directed the proceeds to be divided among five sons of whom Walter was one, but the trustees were directed to invest Walter's share and apply the income during Walter's life upon certain discretionary trusts admittedly valid, and after Walter's death to hold the income of his share during the lifetime of any widow whom he might

(1) [1893] 1 Ch. 54, 57.
(2) 26 Beav. 365.
(3) [1915] 1 Ch. 810, 815.

leave upon discretionary trusts in favour of such widow and all or any of his children and after the death of such widow Walter's share was to be held upon trust for Walter's sons attaining twenty-one and daughters attaining twenty-one or marrying. Walter died on August 19, 1934, leaving a widow. He had two sons who attained the age of twenty-one years in his lifetime.

In view of the fact that the first trust of income after Walter's death is a discretionary trust expressed to be exercisable during the lifetime of any widow who may survive him it is clear that the discretion may be exercisable according to its tenor at a date beyond the period of a life in being at the testator's death and twenty-one years afterwards, since Walter's widow might be a person born after the death of the testator. The discretionary trust would accordingly be invalidated by the rule against perpetuities. This point is covered by the opinion of Warrington J. in *In re Blew* (1), an opinion which I propose to follow though it is not strictly binding on me, since his opinion on the relevant point was not the foundation of the order which he in fact made.

I am invited to hold that, in view of the invalidity of this trust, the vested gift to Walter's children fails. It is to be observed that it cannot be suggested that the fact that the gift to Walter's children does not fall into possession until after the death of any widow who survives Walter, that is to say until a date which may be later than the expiry of a life or lives in being and twenty-one years afterwards, causes that gift to fail. If the gift after Walter's death had been to any widow he might leave for her life, the gift to Walter's children would not fall into possession until after the death of any such widow, but nevertheless the gift to Walter's children would be perfectly good. See as to this *Evans* v. *Walker.* (2)

If it be settled by authority that the invalidity of the limitations of a fund of personalty during the life of Walter's widow, arising from the nature of the trusts of the income

(1) [1906] 1 Ch. 624.

(2) (1876) 3 Ch. D. 211.

during that period, causes failure of a gift of the income and corpus of the fund to the children after the death of the widow, as to which gift it can be predicated, first, that it must necessarily become not only vested but indefeasibly vested within the limits of the rule against perpetuities, and secondly, that it is in no way dependent on or affected by the manner in which the income is applied during the widow's life, I must of course so hold; but no justification in principle was suggested for this result, nor can I think myself of any principle upon which such a result can be based.

My attention was drawn to the language used by Stirling J. in *In re Abbott. Peacock* v. *Frigout* (1), where he said: "It is settled that any limitation depending or expectant upon a prior limitation which is void for remoteness is invalid." I was asked to regard this statement as laying down a rule that any limitation, even of an interest which becomes indefeasibly vested within the perpetuity limits, is void if it falls into possession at the termination of a prior interest which prior interest is held upon trusts void for remoteness. It seems to me reasonably clear, from a perusal of the cases to which Stirling J. refers in his judgment, that he had not any such case in mind. The words he uses seem to be in substance borrowed from those used by Romilly M.R. in *In re Thatcher's Trusts* (2), where the Master of the Rolls says: "If the limitations are ulterior to or expectant upon limitations which are too remote they are void although made to a person in existence at the date of the will." In that case the Master of the Rolls was dealing with a gift which, according to the tenor of the will, and disregarding for this purpose (as is of course necessary) the existence of the rule against perpetuities, did not vest indefeasibly within the perpetuity limits. *In re Hewett's Settlement* (3), in which the decision in *In re Thatcher's Trusts* was followed, dealt with a gift to which the same observation is applicable. It was argued that Eve J. in *In re Backhouse* (4) laid down the suggested rule. I can see no trace that he was intending so

(1) [1893] 1 Ch. 54, 57.
(2) 26 Beav. 365, 370.
(3) [1915] 1 Ch. 810.
(4) [1921] 2 Ch. 51.

to do; and the cases (*In re Mortimer* (1) and *In re Ashforth. Sibley* v. *Ashforth* (2)) on which his decision appears to have been based do not seem to me to lay down any such rule. Reference was also made to an unreported case of *In re Benyon-Winsor* mentioned in the Law Times Newspaper, vol. 143, p. 178, but it was I think conceded that the information available in regard to that case was quite insufficient to enable me to treat it as laying down a rule which, so far as counsel's researches go, seems never to have been formulated in any preceding case.

Since the case was argued my attention has been drawn to the decision, since reported, of my brother Farwell in *In re Canning's Will Trusts. Skues* v. *Lyon.* (3) That case is a crucial example of the principle that the mere fact that a limitation follows upon a prior void limitation is insufficient to invalidate it, where the operation of the limitation which it is sought to impeach is (on the true construction of the document creating the limitation and excluding for this purpose all considerations of perpetuity) wholly independent of the earlier trust, though intended to be made subject to it. Where, as in the present case, with which I am dealing, the limitation which it is sought to impeach creates a future interest which becomes vested in interest (though not in possession) within the limits of the rule against perpetuities and cannot in any event be subsequently divested by the operation of the earlier trust, it would be entirely inconsistent with the principle on which the decision in *In re Canning's Will Trusts* (7) proceeds to hold such a future interest to be adversely affected by the invalidity of the trusts which it follows, but of which it is wholly independent.

The question remains as to the trusts upon which the income of Walter's fund is to be held for the period of the life of his surviving widow. On the frame of the will, having regard to the principles recognized in *Lassence* v. *Tierney* (4), the share is in my judgment to be treated as Walter's share subject only to such restrictions as to the mode of enjoyment

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(1) [1905] 2 Ch. 502.
(2) [1905] 1 Ch. 535.
(3) [1936] 1 Ch. 309.
(4) (1849) 1 Mac. & G. 551.

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as may be operative, and accordingly the income during the period in question ought, in my judgment, to be treated as forming part of Walter's estate, and I will so declare.

Solicitors: *Hanbury, Whitting & Ingle; W. Crimp & Co., for Stanley Richards & Co., Paignton; Jaques & Co., for Robyns-Owen & Son, Pwllheli; Lawrence, Graham & Co.*

H. L. L.

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In re SIR EDWARD HULTON, BT. (DECEASED).

MIDLAND BANK EXECUTOR AND TRUSTEE COMPANY, LIMITED *v.* THOMPSON AND OTHERS.

[1936. H. 624.]

Will—Construction—Corporation trustee—Income fee—Direction to pay clear yearly sum to widow—Incidence of the income fee between the annuitant and the persons entitled to the income of the residue.

A testator by his will directed that out of the yearly income of his residuary estate his trustees should pay to his wife during her life "such an amount as will give her a clear yearly sum of 12,000*l.* after paying or deducting income tax and super-tax" and that "subject thereto" his trustees should stand possessed of his trust estate upon certain trusts for his son and daughter, and directed that all devises bequests legacies and annuities given by his will should be free of all death duties payable on his death which should be paid out of his residuary estate. He directed that a Trust Company whom he appointed one of his executors and trustees should be entitled to remuneration free of duties in accordance with the scale of fees in force at the date of his will.

The fee to the company under the scale in respect of the income dealt with by the company was fifteen shillings per cent., and the whole of such income fee had been paid out of the income of the residuary estate. Questions arose whether any part of the income fee ought to be borne by the annuity, and this summons was issued to decide the point:—

Held, that whether the income fee was to be treated as an administration expense or as a legacy it ought to be borne out of the income of the residuary estate after providing for the annuity.

In re Bentley. Public Trustee v. *Bentley* [1914] 2 Ch. 456 distinguished.

ADJOURNED SUMMONS.

Sir Edward Hulton, of Great Cumberland Place, W.1, and "Downside," Leatherhead, in the county of Surrey, Bt., made his will on November 27, 1924, and thereby appointed the plaintiffs (then known as The London City and Midland Executor and Trustee Company, Ld., and hereinafter called "the Company") and his wife Florence Elizabeth Millicent Hulton to be the executors and trustees of his will and guardians of his then infant son and daughter, and gave and bequeathed a large number of pecuniary legacies and made certain specific gifts (not material for this report) to his wife and son and daughter.

By clause 7 he gave his leasehold house No. 51 Great Cumberland Place or any other house in London which he might occupy at the time of his death to his trustees upon trust to permit his wife to occupy and enjoy the same during her life free of all rent rates taxes insurance premiums and costs of repairs, all of which should be borne by his estate, and directed that upon her death his trustees should hold the same in trust for his daughter Frances absolutely if she attained the age of twenty-one years or married under that age with such consent as thereinafter mentioned.

The testator then made other pecuniary bequests and declared that all devises bequests or legacies specific pecuniary or otherwise and all annuities given by his will should be free of all death duties payable on his death which should be paid out of his residuary estate.

The testator devised and bequeathed all his real and personal estate not thereby otherwise disposed of to his trustees upon trust to sell and convert the same and to provide for his funeral and testamentary expenses debts and legacies and for the duty on any devises legacies or annuities thereinafter given free of duty and on the annuity given to his wife and to invest the surplus of such money.

By clause 14 the testator directed that out of the yearly income of his residuary estate his trustees should pay to his wife during her life such an amount as would give her a clear yearly sum of 12,000*l.* after paying or deducting income tax

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and super-tax at the rates from time to time in force, but not as regards income tax exceeding on the whole five shillings in the pound. Provided that the annual amount so payable to his wife should not exceed one-half of the income of his trust estate.

The testator directed that subject as aforesaid his trustees should stand possessed of his trust estate as to two-thirds thereof upon certain trusts for his son Edward, and as to the remaining one-third thereof upon certain trusts for his daughter Frances.

By clause 32 the testator directed that the Company in its capacity as executor or trustee of his will might act by its proper officer or officers and should be entitled to remuneration free from duties in accordance with the scale of fees in force at the date of his will or such other scale (if any) as might be arranged by written agreement between himself and the Company.

The testator died on May 23, 1925, without having revoked or altered his said will, which was proved on June 24, 1925, in the Principal Probate Registry by the executors thereby appointed. The testator's estate at the time of his death considerably exceeded two million pounds, and the income was more than ample to provide for the annuity.

The testator's wife on or about November 21, 1928, became the wife of John Henry Thompson.

The testator in his lifetime disposed of No. 51 Great Cumberland Place, mentioned in his will, and at the time of his death was in occupation of No. 50 Brook Street, W.1, which therefore passed under the bequest in clause 7 of his will and was occupied by his widow until August, 1934.

After the death of the testator the company charged the whole of the income fee to which they were entitled in respect of the income of the testator's trust estate against the residuary estate to which the son and daughter were entitled. Questions having been raised whether a part or parts of such fee should not have been charged against and paid out of the sums payable under clause 7 of the testator's will in respect of rents rates taxes insurance premiums and

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repairs for No. 50 Upper Brook Street during the time when the testator's widow was in occupation thereof and also the sums payable under clause 14 of the will in respect of the clear annuity thereby bequeathed to the testator's widow, the company, on February 19, 1936, issued this summons for the decision of these questions.

Wilfrid Hunt for the plaintiffs.

Gerald Upjohn for the widow. I submit that the income fee is payable out of the income of the residuary estate and that the annuity is exonerated. Under clause 14 of the will the trustees are directed to pay the widow a clear yearly sum of 12,000*l.* That is not merely a direction for the estate to pay income tax and super-tax. If these words had stood alone they would not have been sufficient to pay the annuity free of income tax and super-tax. The subsequent direction " after deduction of income tax and super-tax " shows that the word " clear " must mean here " clear of all possible deductions." It does not refer to income tax or super-tax or death duties only. Clause 32 of the will is equivalent to a legacy to the Midland Bank Executor and Trustee Company, just as a power to charge for services amounts to a legacy of a solicitor-trustee. Neither this clause nor the rules of the Company have anything to do with the incidence of the fee. The decision in *In re Bentley* (1) holding that an income fee payable to the Public Trustee was chargeable against annuities turned upon the provisions of the Public Trustee Act, 1906, and the rules made thereunder, and does not apply to the present case. The fees in that case were made payable by law, but these fees are paid under the provisions of the testator's will. The sums paid in respect of the house were clearly administration expenses and payable by the residuary estate.

Hon. Denys Buckley for the residuary legatees. I submit that the case is governed by the principles laid down in *In re Bentley* (1) and *In re Hicklin. Public Trustee* v. *Hoare.* (2) Ordinary administration expenses are payable out of residue,

(1) [1914] 2 Ch. 456.

(2) [1917] 2 Ch. 278.

but any special expenses that are exclusively connected with the interests of the tenant for life should be paid by her in the first instance. The fee should be charged against the income of the estate generally in proportion to the rights of the persons entitled to the income. The word "clear" in clause 14 means clear of income tax and super-tax.

Gerald Upjohn in reply. *In re Bentley* (1) was decided entirely on the wording of the Public Trustee Act and the rules made thereunder and has no application here. *In re Hicklin* (2) is quite different from the present case, and I claim that the income fee must be paid by the residuary estate.

Clauson J. The testator, Sir Edward Hulton, made a will which is dated November 27, 1924, and the material part of it is that he gave all his estate, both real and personal, not otherwise disposed of to his trustees upon trust to sell and convert the same into money, and he directed his trustees to pay his funeral and testamentary expenses, debts and legacies, and the duty on legacies given free of duty, and so forth, and directed his trustees to hold his residuary estate, and the investments from time to time representing the same, upon the following trusts: The first trust was out of the yearly income of his trust estate to pay his wife an annuity, and the annuity was so calculated that the income of his trust estate had to bear, not only the lady's annuity, but also the income tax and super-tax, and there was a provision, with which I need not deal in detail, under which some part of the income was to be applied in paying certain expenses of a residence which was provided for Lady Hulton. Then the will provides that, subject as aforesaid—that is as soon as the trustees had out of the income met the obligation that was placed upon them to provide the annuity, and to make these other payments—the trustees should stand possessed of the trust estate upon certain trusts under which various persons were entitled to the income, after the annuity and other payments for the widow's benefit had been borne. The

(1) [1914] 2 Ch. 456.

(2) [1917] 2 Ch. 278.

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will contained this clause: That the Trustee Company, who was the Midland Bank Executor and Trustee Company, Ld., should be entitled to remuneration, free from duties, in accordance with the scale of fees in force at the date of the will, or such other scale (if any) as might be arranged by written agreement between the testator and the Company. One provision of the scale which was thus imported into the will was a provision that the trustee should be entitled to receive an income fee, which was a fee of 15*s.* per cent. charged on income collected, distributed, or accumulated, and nobody doubts that the trustee is entitled, out of the income of the estate, year by year, to be paid the fee of 15*s.* per cent. on the amount of that income. This is not a question between tenant for life and remainderman, but it is a question between those who are interested in the income. What, according to the evidence, has hitherto been done is this—I am reading from the affidavit in support of the summons—" Up to the present the plaintiff company have charged the whole of their income fee as trustees in respect of the income of the trust estate of the testator against the shares therein of the testator's said son and daughter." Those are the people who took the residuary estate, and who were interested in the income, subject to the annuity, and other benefits provided for the widow. The affidavit goes on: " Doubts have now arisen as to whether a part or parts of such income fee should not have been charged against and paid out of the sums payable in respect of expenses for the upkeep of the house, and the sums payable in respect of the annuity, and tax thereon." Then details are given of the amount of the income fee.

The question which I have to determine is whether this income fee ought to have been, or ought to be, charged and paid out of the income of the residuary estate, or whether the trustees ought, for the future, at all events, to apportion the 15*s.* per cent. payable in respect of the income over the whole of the income, thus charging the annuitant with a proportion of that income fee. If that is the right way in which to deal with the matter there is, apparently, no difficulty raised as to the readjustment of past accounts. Of course, the fee of 15*s.* per cent. is a small matter compared with the income, which, in this case, is very large. There are two ways of envisaging this income fee. It can be regarded as being a legacy to the trustees in consideration of the work which they do as trustees on the same plane as the provision that one not infrequently finds that, during the continuance of the trust, the trustee shall be entitled to an annual remuneration of 10 guineas or 50 guineas, or something of that kind. Next it might be looked at from a slightly different point of view, and regarded as an authorized trust expenditure, an addition to the ordinary administration expenses authorized by the will. I do not myself think that, for the purposes of what I have to decide to-day, it matters very much in which way the thing is envisaged, because what I have to see is whether there is, in this will, a provision which indicates the way in which the charge is to be borne. In my view, on this will —and the same observation would apply to any will in which there is an annuity charged on the fund—it is perfectly clear that the persons who are interested in the income, other than the annuitant, are to have nothing until the annuity is paid in full. When the annuity has been paid they are to have the rest. They are, in respect of this income, in the same position, as compared with the annuitant, as that in which a residuary legatee is in an ordinary case as compared with a legatee. Just as in the case of an ordinary residue administration expenses must necessarily fall upon the residuary legatee, and not—assuming, of course, that the fund is sufficient—upon a legatee, so here I see no reason whatever why any expenses incurred in administration of the income which, admittedly, have to be borne by income, should not be borne by the person who is in the position of a residuary donee of the income, to the discharge of the person entitled to the annuity. That seems to me, prima facie, to be the position. In saying that I have been treating the income fee as an administration expense. The suggestion is entirely new to me that ordinary income administration expenses where there is an annuitant whose annuity has to be discharged before the income is distributed among the other persons entitled to it could ever be charged proportionately against the annuitant.

Let us look at it for a moment from the other point of view. Let us assume that the right way to look at it is that this is a legacy on the same footing as an annuity given to a trustee, so long as he is trustee, for his work. Why should any part of that be charged upon the annuitant ? It is simply another annuity charged on the income, an annuity which has to be met before those entitled to the balance left of the income receive that to which they are entitled. On what possible principle can that be charged upon the annuity ? I confess that I have been unable to follow it. Therefore, approaching the matter from either of these two alternative standpoints, it seems to me that the result is clear that the income fee must be borne by those to whom the balance of the income is payable. I am not dealing, of course, with a case of deficiency. If there was not enough income to pay the annuity, and the annuity was falling short, the annuitant might have to bear part of the income fee, although I can see that there is a possible point on that if the income fee is to be regarded quite strictly as a legacy ; but, anyway, I am not dealing with that point. I am dealing with a case in which there is ample income to meet the annuity, and there is further income. The question is whether those entitled to the further income are entitled to object to the whole of the income fee being deducted from what comes to them.

I have not found in this matter any assistance from authority. I have been referred to a case of *In re Bentley* (1) decided by Astbury J. That was a decision given in a case to which the Public Trustee Act of 1916 and certain rules made under that Act applied. So far as I can judge from the course of the argument as reported, the discussion seems to have turned mainly upon the operation of those provisions, which, of course, do not apply in the case before me. So far as the decision was one upon the provisions of that Act, and the rules under it, it has no bearing upon the matter with

(1) [1914] 2 Ch. 456.

CLAUSON J.
1936
SIR EDWARD HULTON, BT., *In re.*
MIDLAND EXECUTOR AND TRUSTEE CO. *v.* THOMPSON.

which I am concerned. It is suggested that some principle is to be deduced from the judgment of Astbury J. in that case with regard to the matter with which I have to deal. I can only say that, reading the decision with the utmost care, and having the assistance of counsel in the matter, I have been quite unable to formulate to myself any principle which can be deduced from that decision.

Solicitors: *Linklaters & Paines; Withers & Co.*

E. K. C.

LUXMOORE J.
1935
March 10.

SPINK (BOURNEMOUTH), LIMITED *v.* SPINK.

[1936. S. 573.]

Company—Private company—Director and manager—Agreement to resign—Consideration payable by company—Agreement to sell shares to remaining director—Payment made by cheque drawn on company's account—Covenant not to carry on similar business within a certain radius—Whether enforceable—Companies Act, 1929 (19 & 20 *Geo.* 5, *c.* 23), *s.* 45.

The defendant, being a director and manager of the plaintiff company, who carried on business as garage proprietors and motor-car dealers, entered into a written agreement with the company in consideration of a cash payment to resign both positions, covenanting also not to carry on or assist in carrying on a similar business within a certain radius for a period of five years. The agreement further provided that he should transfer his shareholding in the company to another director for 250*l.*, and this sum was paid to him by a cheque drawn on the company's account:—

Held, (1.) that assuming the agreement to be one between employer and employee, the restrictive covenant was not rendered invalid as being contrary to public policy by reason of the fact that it was entered into on the termination of the employment instead of at the beginning.

(2.) that if the payment for the shares by the company's cheque was such as to contravene s. 45, sub-s. 1, of the Companies Act, 1929, and to render the company liable to a fine under sub-s. 3, which was not proved, the agreement was not thereby rendered invalid.

MOTION.

Until 1932 the defendant Douglas Spink and his brother John Spink carried on business in partnership as garage proprietors and motor-car dealers. On August 27, 1932, the plaintiff company was incorporated as a private company for the purpose of acquiring the business, its nominal capital being 10,000*l*. divided into 5000 preference shares and 5000 ordinary shares. The defendant held 325 ordinary shares and his wife 175 and John Spink 350 and his wife 150. One John Allcroft, a director, held all the preference shares and 1000 ordinary shares. The defendant and John Spink became permanent directors entitled to hold office as long as they lived. They also became joint managers. On September 25, 1934, as a result of certain disputes, the defendant, his brother and the plaintiff company entered into a written agreement under which the defendant agreed to resign his directorship and his position as an employee of the company in consideration of 100*l*. paid by the company to him and to sever his connection with the company, that sum being in full satisfaction of all his claims against the company. Clause 4 provided: "Mr. Douglas Spink hereby further agrees in consideration of the payment of the said sum of one hundred pounds that he will not for a period of five years from the date hereof carry on or assist in carrying on the business either as a director, partner, manager, servant or agent of a garage proprietor, motor-car seller or motor-car distributor within a radius of ten miles from the General Post Office, Bournemouth." Clause 5 provided: "Mr. Douglas Spink hereby further agrees that he will forthwith transfer his said holding of three hundred and twenty five one pound fully paid ordinary shares in the company to Mr. John Spink in consideration of the sum of two hundred and fifty pounds." The company further agreed to release him from all claims against him. The shares were duly transferred and the sums of 100*l*. and 250*l*. were paid by cheques drawn on the company's banking account. In 1936 the plaintiff company, having ascertained that the defendant intended to enter the employment of Henly's (1928), Ld., a company carrying on business as garage proprietors within the radius prohibited by the agreement, commenced this action to restrain him from committing a breach of the covenant. By agreement, the hearing of this motion was treated as the trial of the action.

Sir Gerald Hurst K.C. and *Charles Luxmoore* for the plaintiffs: The restrictive covenant was not wider than was necessary for the protection of the plaintiff company. The whole agreement was analogous to the dissolution of a partnership: *In re Yenidje Tobacco Co., Ld.* (1) The plaintiffs were not protecting themselves against the defendant's skill and experience, but against his confidential knowledge of the business. Moreover, the covenant was connected with the sale of shares and was for the protection of the goodwill. There is more freedom of contract between buyer and seller than between master and servant: *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (2)

Spens K.C. and *H. S. G. Buckmaster* for the defendant. This is simply the case of an employee of a company who received a sum of money in consideration of relinquishing his employment and collaterally entered into an agreement not to compete with it. The covenant was wider than was reasonably necessary for the protection of the plaintiff's business, and is void as being in restraint of trade. The principles to be applied are stated in *Wyatt* v. *Kreglinger and Fernau.* (3) Moreover, inasmuch as the covenant was entered into on the termination of the defendant's employment and not at the beginning, it is on that ground void as being contrary to public policy: *Attwood* v. *Lamont.* (4) Furthermore, the consideration paid to the defendant in respect of the sale of his shares was paid by cheque drawn on the account of the plaintiff company, contrary to s. 45 of the Companies Act, 1929. (5) The matter having been carried

(1) [1916] 2 Ch. 426, 432, 434.

(2) [1894] A. C. 535, 566.

(3) [1933] 1 K. B. 793, 806, 808, 809.

(4) [1920] 3 K. B. 571, 583, 589.

(5) Sect. 45: "(1.) Subject as provided in this section, it shall not be lawful for a company to give, whether directly or indirectly, and whether by means of

through in an illegal manner, the Court should not enforce the agreement.

Sir Gerald Hurst K.C. in reply. The restrictive covenant is not void as being contrary to public policy. Moreover, it is severable from the agreement to sell the shares. If the provisions of s. 45 have been contravened, the company has simply made itself liable to a fine under sub-s. 3, and the covenant is not thereby rendered unenforceable.

LUXMOORE J. [after stating the facts :] There is no question but that if Douglas Spink takes up his intended employment there will be a breach of clause 4 of the agreement to which I have just referred. But it is said on his behalf that the agreement is invalid, as being contrary to public policy, because it is in the nature of an agreement between an employer and an employee, and is made, not when the employee is entering into the service of the employer, but on his leaving. So far as the facts of this case are concerned, I do not think the agreement is really in the nature of an agreement between an employer and an employee; it is much nearer the case of a partner in a business going out of that business and entering into an agreement at the end of the partnership, but it does not seem to me to make much difference which way the agreement is viewed. In all cases where there is something in the nature of a sale of goodwill, covenants of this kind are looked at with less stringency than when they are entered into between employer and employee; but assuming this to be a case of employer and employee, I see no reason for holding this to be a bad covenant. When a man enters into the employment of another he may subject himself to restrictions. The question in each case is whether the restriction is wider than is necessary for the

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a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase made or to be made by any person of any shares in the company. . . .

(3.) If a company acts in contravention of this section, the company and every officer of the company who is in default shall be liable to a fine not exceeding one hundred pounds."

protection of the covenantee. In the present case, if this had been an agreement between an employer and an employee made at the outset of the employment, I do not think any one could have suggested that the covenant was wider than was necessary for the employer's protection.

Now, can it be said to be invalid because it was entered into in circumstances which amounted to a release by the employer of the employee from his liability to continue in his service, consideration being also paid to the employee by the employer ? I cannot appreciate the view that public policy requires that a person who is seeking to be released from his employment should not be able to obtain that release and a payment to himself as consideration for his giving up his service and entering into a proper restrictive covenant as part of the bargain. Such a covenant cannot affect adversely any member of the public or the person who, with his eyes open, takes the consideration and gives the covenant. In my judgment, the covenant is proper and is one which can be enforced. There is nothing illegal or contrary to public policy in its terms.

It has also been said that the agreement cannot be enforced because on the evidence it is shown that the sum of 250*l.* was paid by the company instead of by John Roland Spink, and it has been argued that such a payment is within the prohibition laid down by s. 45, sub-s. 1, of the Companies Act, 1929, which provides : " Subject as provided in this section it shall not be lawful for a company to give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of, or in connection with, a purchase made or to be made by any person of any shares in the company. . . . ." It is quite true that if the 250*l.* had been lent by the company to John Roland Spink for the purpose of enabling him to fulfil his obligation under the agreement, the provisions of s. 45 would have been applicable; but I am not told the circumstances in which the 250*l.* was paid. It may be that 250*l.* was owing to John Roland Spink by the company at the time, and if so there would have been no objection to the company paying that money by their cheque, and no contravention of the section at all. But, in any case, the agreement to purchase the shares was an agreement by John Roland Spink with his brother, and is severable from the rest of the agreement in question. So far as it was an agreement between the two brothers, there is nothing whatever in the section to suggest that it became illegal or unenforceable if the company provided any part of the purchase price consideration. The position simply is that if the company has contravened the provisions of s. 45 it has subjected itself to liability to a fine under sub-s. 3.

In my judgment, there is no ground for refusing the relief which the company seeks in this action by reason of anything which may have happened contrary to the provisions of s. 45 of the Companies Act, 1929, and in the result I think the plaintiffs are entitled to the relief which they seek by their notice of motion.

The parties have agreed that the hearing of the motion shall be treated as the trial of the action, and in those circumstances I grant to the plaintiffs an injunction during the remainder of the period of five years limited by the agreement restraining the defendant "from carrying on business or assisting in carrying on the business either as a director, partner, manager, servant or agent of a garage proprietor or motor car seller or motor car distributor within a radius of ten miles from the General Post Office, Bournemouth, in breach of his covenant contained in an agreement dated September 25, 1934." The defendant must pay the costs of the action.

Solicitors: *Peacock & Goddard, for Luff, Raymond & Williams, Wimborne; Clifford-Turner, Hopton & Lawrence.*

F. H. C.

BENNETT J.

1935 Dec. 11, 12, 13.

ATTORNEY-GENERAL *v.* GRAVESEND CORPORATION.

[1934. A. 2620.]

Electricity—" Supply "—Area of supply—Point of supply—" Consumer's terminals "—Definition—Electric Lighting (Clauses) Act, 1899 (62 *&* 63 *Vict. c.* 19), *Schedule, clauses* 1, 4*—Electricity (Supply) Acts,* 1882–1928.

For the purposes of the Electricity (Supply) Acts, " consumer's terminals " are the ends of the lines of supply on the consumer's premises; and " supply " means supply at the consumer's terminals.

Attorney-General v. *Leicester Corporation* [1910] 2 Ch. 359 and *Attorney-General* v. *County of London Electric Supply Co.* [1926] Ch. 542 considered and applied.

ACTION.

The plaintiffs, the Attorney-General (at the relation of the Kent Electric Power Company) and the Kent Electric Power Company claimed against the defendants, the Mayor, Aldermen and Burgesses of the Borough of Gravesend, an injunction to restrain the defendants from supplying electrical energy to the premises of the Cellactite and British Uralite, Ld., and of the Atlas Stone Company, Ld., or from supplying otherwise electrical energy beyond the defendants' authorized area of supply.

The defendants were supplying electrical energy under the provisions of three statutory Orders: (1.) an Electric Lighting Order, confirmed by the Electric Lighting Orders Confirmation (No. 5) Act, 1898; (2.) the Gravesend Electricity Extension Special Order of 1928, made by the Electricity Commissioners under the Electricity (Supply) Acts and confirmed by the Minister of Transport under the Electricity (Supply) Act, 1919; (3.) the Gravesend Electricity Extension Special Order, 1931, made by the same authority. There were incorporated into these Orders the provisions in the Schedule to the Electric Lighting (Clauses) Act, 1899. Clause 4 of that Schedule provides that " (1.) the area of supply shall be the area named for that purpose in the Special Order " and " (2.) the undertakers shall not at any time after the commencement of this Special Order supply energy or (except for the purposes of that Order) erect or lay down any electric lines or works beyond the area of supply otherwise than under the authority of Parliament, or under a licence granted by the Board of Trade under the principal Act."

The plaintiffs were authorized to supply electrical energy in the county of Kent, except the Isle of Thanet, and their complaint was that the defendants were supplying electrical energy outside the area in which they were authorized to supply it by the said three Orders. The works of the Cellactite and British Uralite Company and the Atlas Stone Company were situated in the neighbourhood of the defendants' eastern boundary, but on the east side of it. The defendants began to supply electrical energy to these two companies under the provisions of what is called a Fringe Order made by the Electricity Commissioners on January 25, 1929, under s. 6 of the Electric Lighting Act, 1909, which provides as follows: "Where it is proved to the satisfaction of the Board of Trade that the occupier of any premises is desirous of obtaining a supply of electricity from any undertakers within whose area of supply those premises are not situate, the Board of Trade may, if the local authority, within whose district the premises are situate, and the undertakers (if any) authorised to supply electricity to such premises, consent, by order permit the first mentioned undertakers to give a supply to those premises on such terms and subject to such conditions as the Board think fit." The Fringe Order of January 25, 1929, was in these terms: "Whereas application has been made to the Electricity Commissioners under the provisions of the Electricity (Supply) Acts, 1882 to 1928, by the Mayor Aldermen and Burgesses of the Borough of Gravesend (hereinafter called 'the Undertakers') being Undertakers for the supply of Electricity within the Borough of Gravesend for an Order under those Acts authorising the supply of electricity to the premises of Cellactite and British Uralite, Limited, and Hodsons Concrete Units, Limited, situate within the rural district of Strood And whereas the Electricity Commissioners have considered such application Now therefore the Electricity Commissioners in pursuance of the powers exerciseable by them on behalf of the Minister of Transport under the aforesaid Acts hereby order that as from the date hereof the Undertakers may supply electricity to the said premises notwithstanding that the same are outside the area of supply of the Undertakers subject to the same obligations but with the same rights in all respects as if the said premises were within that area and may break up such streets and roads and may lay down and place therein such electric lines and other works as may be necessary for that purpose under and in accordance with the provisions of the Electricity (Supply) Acts, 1882 to 1928, and of the Schedule to the Electric Lighting (Clauses) Act, 1899, with respect to the breaking up of the streets and the laying down and placing therein of electric lines and other works by Undertakers who are not the local authority of the district. This Order is subject to revocation whenever any Undertakers in whose area of supply such premises may be situate are able and willing to give a supply to such premises on reasonable terms and to pay to the Undertakers such portion of the expenditure incurred by the Undertakers in giving such supply as may be agreed or failing agreement as may be determined to be reasonable by an arbitrator to be appointed by the Minister of Transport." Hodsons Concrete Units, Ld., referred to in the Order as being the owners of premises wanting to have a supply, were the predecessors of the Atlas Stone Company.

That Fringe Order having been obtained, the energy was brought from the defendants' generating station to the premises of the Cellactite Company and the Atlas Stone Company by an overhead cable suspended from poles placed on the towpath of a canal, which was the property of the Southern Railway Company, under two agreements made between the Southern Railway Company of the one part and the defendants of the other part.

The terms upon which the two companies were supplied by the defendants with energy were set forth in two agreements dated March 25, 1929, and March 18, 1933, respectively.

In 1933, the plaintiff company was in the position to supply electrical energy to the Cellactite Company and the Atlas Stone Company, and, in order to supply electrical energy to those two companies, it applied to the Electricity Commissioners with a view to the Commissioners revoking the Fringe Order, and on October 6, 1933, the Electricity Commissioners revoked the Fringe Order, the order of revocation reciting that: " the Electricity Commissioners are satisfied that the Company are able and willing to give a supply to such premises "—those being the premises of the Cellactite Company and the Atlas Stone Company—" on reasonable terms " and that they were willing to pay certain compensation.

The defendants thereupon made an agreement on September 27, 1933, with the Cellactite Company, which provided, by clause (2.): " The Company shall take and the Corporation shall give a supply of Electricity at a point within the area of supply of the Corporation being the point at which a meter or meters referred to in para. 4 hereof shall be placed." Clauses (4.) and (5.) provided: " The Corporation will provide all necessary service cables which shall terminate at or near the eastern boundary of the Parish of Chalk in the Rural District of Strood in the County of Kent being a point within the area of supply of the Corporation where the Corporation will also provide the necessary meter or meters. Clause (5.) In consideration of this Agreement the Corporation hereby sell and the Company hereby purchase all cables poles and other appliances and equipment at present belonging to the Corporation to the east of the point where the said meter or meters shall be fixed which were originally provided by the Corporation for the purpose of supplying electricity to the works of the Company situate in the Parish of Shorne in the Rural District of Strood in the County of Kent." On September 29, 1933, an agreement was entered into between the Southern Railway Company and the Cellactite Company by which the Southern Railway Company granted to the Cellactite Company the right " to maintain and use in or upon through or over the company's property at or near the Gravesend and Higham Canal in the County of Kent the works more particularly described in the Schedule." The works more particularly described in the Schedule were described as "18 wooden poles along the course of the towing path of the Gravesend and Higham Canal and a 3 core electric cable . . . . suspended at least 22 feet above the surface of the said towing path on the said poles, and also passing under the said canal in one place, the route of such cable being indicated by a red line on the plan attached hereto."

For that privilege or licence the Southern Railway Company received from the Cellactite Company the sum of 1*s*. a year. Simultaneously another agreement was made between the Southern Railway Company and the defendants whereby the defendants were given a licence to place a line of poles and to suspend from those poles a cable between their generating station and, approximately, the point at which the wayleave of the Cellactite Company began in the west. For that privilege the defendants paid the Railway Company the annual sum of 10*l*.

The pole upon which the defendants placed the meter referred to in clause (4.) of the agreement of September 27, 1933, was numbered 39 on the agreed plan and was within the area in which the defendants were authorized to supply electrical energy. The cables running from that pole in an easterly direction to the works of the Cellactite Company and the Atlas Stone Company were outside the defendants' area.

Tyldesley Jones K.C. and *A. Andrewes-Uthwatt* for the plaintiffs. The terms "main" "service line" "consumer's terminals" and "supply" are defined in the Schedule to the Electric Lighting (Clauses) Act, 1899. The defendants are supplying electricity outside their area. The Cellactite Company have no control over the current supplied to them except at their works. It is not enough that the consumer's terminals are in the area while delivery is outside the area. See *Attorney-General* v. *County of London Electric Supply Co.* (1)

In the present case (*a*) the terminals are not on the consumer's premises, (*b*) if they are on the consumer's premises, delivery is not at the end of the line, and, in order to comply with the statutory provisions, the undertakers are bound to deliver at the terminals: see *Attorney-General* v. *Leicester Corporation* (1) and *Attorney-General* v. *West Gloucestershire Water Co.* (2)

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(1) [1926] Ch. 542.

R. M. Montgomery K.C. and *S. M. Noakes* for the defendants. Nothing more was decided in *Attorney-General* v. *County of London Electric Supply Co., Ld.* (3), than that the consumer's terminal was one at which the undertakers were not entitled to give a supply. "Premises" includes all places where the consumer has rights contiguous to or of which he has the use or enjoyment in connection with the premises. [They referred to *Attorney-General* v. *Leicester Corporation.* (1)]

Tyldesley Jones K.C. in reply. "Premises" means some kind of property for which a supply of energy can be required. It is clear from s. 27 of the Schedule to the Act of 1899 that "premises" means some real property for which a supply may be required. [He referred to *Gas Light & Coke Co.* v. *South Metropolitan Gas Co.* (4) and to the definitions of "main" and "service line" in s. 28 of the Schedule to the Act of 1899.]

BENNETT J. [after stating the facts continued:] On those facts the defendants say: "We are delivering electrical energy within our area of supply. We are delivering our electrical energy at the meter on the pole which has been numbered 39, and that point is within our boundary" and they say: "So long as we are delivering energy within our boundary and so long as the consumer has agreed to take delivery of our energy within our boundary, we are not infringing the statutory prohibition against supplying beyond the area of supply."

The plaintiffs say that upon the true construction of the Electric Lighting Acts and, in particular, the Electric Lighting (Clauses) Act, 1899, and the provisions in the Schedule to that Act, which are incorporated into the defendants' Orders, the defendants infringe the prohibition if they deliver electrical energy otherwise than at the consumer's terminals, and that the consumer's terminals must be found to be within the undertaker's area of supply. They say that in this case there are not to be found at pole 39 any consumer's terminals and that the provisions of the statute prohibit undertakers and consumers from making an arrangement or an agreement which will enable the undertakers to deliver electrical energy at any other place except the consumer's terminals. Their argument is that Tomlin J. and Neville J. have so decided.

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(1) [1910] 2 Ch. 359.
(2) [1909] 1 Ch. 636; [1909] 2 Ch. 338.
(3) [1926] Ch. 542.
(4) (1889) 62 L. T. 126.

The question depends to some extent upon the definition of three terms which are to be found in the Schedule to the Electric Lighting (Clauses) Act, 1899, which are incorporated in the defendants' Orders. By the first clause of the Schedule "main" is defined as "any electric line which may be laid down by the undertakers in any street or public place, and through which energy may be supplied or intended to be supplied by the undertakers for the purposes of general supply." "'Service line' means any electric line through which energy may be supplied or intended to be supplied by the undertakers to a consumer either from any main or directly from the premises of the undertakers." "The expression 'consumer's terminals' means the ends of the electric lines situate upon any consumer's premises and belonging to him, at which the supply of energy is delivered from the service lines." Mr. Montgomery's first argument was that by the agreement of September 27, 1933, the defendants and the Cellactite Company had agreed that the defendants should supply the electricity to the Cellactite Company within their area and that the Cellactite Company had agreed to take delivery of supply within the defendants' area. I think by clause 2 they have so agreed. His next point on the agreement was that by it all the cables outside the defendants' area, by which electricity was delivered to the Cellactite Company, had been made the property of the Cellactite Company, and I think that is the effect of clause 5 of the agreement. Then he argued that the service line of the defendants ended at the point at which the defendants had erected a meter in accordance with the provisions of the agreement of September 27, 1933—namely at pole 39. Then he argued that the Cellactite Company's terminals were to be found at that point, his argument being that at that point there was something which could properly be described as the consumer's premises.

I am quite satisfied that, upon a proper construction of clause 1 of the Schedule to the Electric Lighting (Clauses) Act, 1899, the point at which the wires or lines of the Cellactite Company meet the lines which are the property of the defendants is not the consumer's terminals as defined by the Schedule. Consumer's terminals must, in my judgment, be found upon some land or some building upon land for which electrical energy is required. I cannot hold that upon a proper construction of clause 1 of the Schedule to the Electric Lighting (Clauses) Act, 1899, the terminals of the Cellactite Company are at pole 39. If that be so, then, if Tomlin J. and Neville J. have decided that "supply" within the meaning of the Electric Lighting Acts means supply at the consumer's terminals, it seems to me that the defendants are infringing the prohibition of the Order.

The question is whether Tomlin J. and Neville J. did so decide.

After having read the judgment of Tomlin J. and after having had it discussed by Mr. Montgomery and Mr. Tyldesley Jones, and after having heard the judgment of Neville J. in *Attorney-General* v. *Leicester Corporation* (1) discussed, I come to the conclusion that they have decided that "supply," for the purposes of the Acts, means supply at the consumer's terminals, and once that conclusion is reached, it becomes clear that if delivery is made to a consumer at some place other than his terminals, even if the place of delivery is within the area of the undertakers, the prohibition is infringed, if the supply so delivered is used outside the undertakers' area. On the true interpretation of the statute, delivery must be made at a consumer's terminals, and those terminals must be placed upon some land or some building upon land for which electrical energy is required, and that land or building must be within the undertakers' area of supply.

(1) [1910] 2 Ch. 359.

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The result is that, in my judgment, the action succeeds and the plaintiffs are entitled to the injunction which they claim. There will be an order upon the defendants to pay the plaintiffs' costs.

Solicitors: *I. R. G. Jones; Watkins, Pulleyn & Ellison, for H. H. Brown, Town Clerk, Gravesend.*

J. L. D.

BENNETT J.
1936
Feb. 7, 11.

In re HEARTS OF OAK ASSURANCE COMPANY, LIMITED.

[00827 of 1922.]

Company—Winding up—Insurance company—Life assurance policies—Industrial assurance policies—General creditors—Statutory deposits—Proofs of policy holders and general creditors—Priority—Life Assurance Companies Act, 1870 (33 *&* 34 *Vict. c.* 61), *s.* 3—*Assurance Companies Act,* 1909 (9 *Edw.* 7, *c.* 49), *s.* 2, *sub-ss.* 1, 3, 4; *s.* 3—*Industrial Assurance Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 8), *ss.* 12, 14.

Where a statutory deposit has been made by an assurance company, the policy holders of the class in respect of which the deposit was made and the general creditors of the company whose claims arise in connection with the business of that class have, in a liquidation, a claim in priority to other creditors over the investments made by the company representing that deposit.

In re South East Lancashire Insurance Co., Ld. [1935] 1 Ch. 225, and *Liquidators of the Glasgow Assurance Corporation* v. *Welsh Insurance Corporation* 1914 S. C. 320 applied.

Where an assurance company goes into liquidation the holder of an industrial policy entered into before the year 1924, must, before he can make a claim against the deposit made under the Life Assurance Companies Act, 1870, show that, if he is only admitted to prove against the deposit made under the Act of 1923 and against the general assets, he would receive less than he would have received if the Act of 1923 had not been passed.

SUMMONS.

The Hearts of Oak Assurance Co., Ld., was a company formed in 1903 under the Companies Acts, 1862 to 1900, to carry on various classes of insurance business and it carried on ordinary life insurance business and industrial life insurance business and deposited 20,000*l.* in Court under the provisions of the Life Assurance Companies Act, 1870. When the Assurance Companies Act of 1909 came into operation the deposit became subject to the provisions of ss. 2 and 3 of that statute.

A further deposit of 20,000*l.* was made by the company in 1924 in accordance with the provisions of s. 12 of the Industrial Assurance Act, 1923. By that section Industrial Assurance was constituted thenceforward a separate class of business for the purposes of the Act of 1909.

On December 19, 1932, an order was made for the winding up of the company and a liquidator was duly appointed.

A summons was taken out, in 1935, by the liquidator for the determination by the Court of the question whether the investments representing the deposit of 20,000*l.* made by the company under the Life Assurance Act, 1870, in respect of its life assurance business was applicable to meet any and what claims in respect of the ordinary life business and industrial assurance business of the company, or claims in respect of its ordinary life business only, or what claims the same was applicable to meet.

Cecil Turner for the liquidator.

Hon. D. B. Buckley for the life policy holders. When a company goes into liquidation the balance sheet must be brought down to date and the assets realized. The cash proceeds must be applied in satisfying rateably as far as possible the liabilities of the various funds. The provisions of the Act of 1909 give to creditors in respect of a particular part of the business special rights against a portion of the assets. He referred to *In re National Standard Life Assurance Corporation.* (1)

The funds are assets but the investments are mixed together. When you come to ascertain the true position of the company it is necessary to ascertain how much represents the various funds.

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(1) [1917] 1 Ch. 193.

The ordinary life assurance fund is not liable to meet the claim of any creditors except in so far as they can say that their debt arose in connection with ordinary life assurance business. The deposit is part of the life assurance fund, and the benefit is for the life policy holders and for nobody else.

The industrial policy holders are, having regard to the proviso contained in s. 14 of the Act of 1923, entitled to prove against the life fund to the extent that the operations of that statute act to their prejudice. That involves a somewhat elaborate investigation on the part of the liquidator.

The effect of s. 3 of the Act of 1909 (1) is only to create a kind of watertight compartment as between the business of the company, so far as it consists of the carrying on of assurance business of a particular class, and any other business carried on by the company: see *In re South East Lancashire Assurance Co.* (2)

C. A. J. Bonner for a pre-1924 industrial life policy holder. As soon as the fund is ascertained in the hands of the liquidator, the policy holder whose fund is in the hands of the liquidator is entitled to be satisfied in priority to any one else out of that fund—in priority to every other claim. If the fund deposited under the Act of 1923 is inadequate to satisfy the claims of the pre-1924 industrial life policy holders, they are entitled to claim against the life policy fund.

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(1) Assurance Companies Act, 1909, s. 3, sub-s. 1: "In the case of an assurance company transacting other business besides that of assurance or transacting more than one class of assurance business, a separate account shall be kept of all receipts in respect of the assurance business or of each class of assurance business, and the receipts in respect of the assurance business, or, in the case of a company carrying on more than one class of assurance business, of each class of business, shall be carried to and form a separate assurance fund with an appropriate name: Provided that nothing in this section shall require the investments of any such fund to be kept separate from the investments of any other fund."

Sub-s. 2: "A fund of any particular class shall be as absolutely the security of the policy holders of that class as though it belonged to a company carrying on no other business than assurance business of that class, and shall not be liable for any contracts of the company for which it would not have been liable had the business of the company been only that of assurance of that class, and shall not be applied, directly or indirectly, for any purposes other than those of the class of business to which the fund is applicable."

(2) [1935] 1 Ch. 225, 243.

He referred to *Liquidators of the Glasgow Assurance Corporation* v. *Welsh Insurance Corporation* (1), and *In re British Union & National Insurance Co., Ld.* (2)

A general creditor, whose claim is not exclusively referable to that particular class of insurance business, cannot make a claim on the fund in competition with a policy holder.

A landlord is a general creditor and is entitled to claim against so much of the fund as is over, after satisfying the policy holders.

J. S. Roope Reeve for post-1923 industrial policy holders, adopted the argument advanced on behalf of the pre-1924 industrial life policy holders.

B. M. Cloutman for a general creditor. Following the scheme of the Act there are various funds. It is clear from the *Glasgow Assurance Corporation* case (1) that the very fact that separate funds have to be kept points to apportionment. If the assets must be apportioned the liability must be apportioned.

BENNETT J. This is a troublesome question arising upon the construction of an Act which is not easy to understand—The Assurance Companies Act, 1909. The question arises in the liquidation of the Hearts of Oak Assurance Co., Ld.

That company was formed in the year 1903 under the Companies Acts, 1862 to 1900, to carry on various classes of insurance business and it carried on ordinary life insurance business and industrial life insurance business and, because it carried on those classes of business it was bound by the provisions of the Life Assurance Companies Act of 1870 to deposit the sum of 20,000*l.* in Court; and when the Assurance Companies Act of 1909 was passed the deposit so made became subject to the provisions of ss. 2 and 3 of that Act.

The effect of s. 2, sub-s. 3, of that Act is that the deposit is to be regarded as part of the assets of the company and the effect of sub-s. 4 is that the deposit made in respect of any class of business in respect of which a separate assurance fund is required to be kept shall be deemed to form part of that fund; so that under the Act of 1909 the deposit was to be regarded as part of the separate fund required to be kept for life assurance business.

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(1) 1914 S. C. 320, 330, 335, 337.

(2) [1914] 2 Ch. 77.

The provisions of s. 3 are as follows: [His Lordship read the section and continued:] The Hearts of Oak Assurance Co., Ld., was carrying on more than one class of assurance business and the first question which has to be decided in the liquidation is whether the investments representing the statutory deposit are assets available for meeting the claims of creditors of the company whose claims are unconnected with life assurance business. Holders of life policies, whether ordinary life policies or industrial life policies, contend that they and they alone have a right to prove against the deposits which this company has made and that no ordinary creditor has any right to have his claim met out of these deposits.

I think so far as I am concerned that I can decide the case on the principle stated by Maugham L.J. in *In re South East Lancashire Insurance Co., Ld.* (1) The section in Lord Maugham's view and also in the view of Neville J. expressed in *In re National Standard Life Assurance Corporation* (2) was not framed so as to give policy holders a security over the deposit.

There is nothing in the language of the section from which a charge can be implied in favour of the policy holders of the class in respect of which the deposit has to be made. The effect of the section is, to use the language of Maugham L.J., to create a kind of watertight compartment as between the business of the company so far as it consisted of carrying on assurance business of a particular class and any other business carried on by the company, and the result of that is that those policy holders of the class in respect of which the deposit has been made and those creditors of the company who have claims in connection with that class of business are entitled to regard the deposit made in respect of that class of business as something over which they have a preference over other creditors of the company.

(1) [1935] 1 Ch. 225, 243.

(2) [1917] 1 Ch. 123.

That principle was also applied in the case in the Scottish Court of Appeal: *Liquidators of the Glasgow Assurance Corporation* v. *Welsh Insurance Corporation.* (1)

I was pressed, and quite properly pressed, by Mr. Bonner that the Court of Appeal in *In re British Union and National Insurance Co., Ld.* (2) had decided that the deposit made by a company carrying on a life insurance business was the absolute security of the life policy holders and it is quite true that Lord Cozens-Hardy M.R. delivering the judgment of the Court of Appeal used words which at first sight seem to afford a foothold for Mr. Bonner's argument.

When the facts of the case are looked at it becomes clear that the Court was not asked to decide and therefore could not have considered the question between creditors upon policies of the class of business in respect of which the deposit was made and creditors whose claims were unconnected with that class of business, and I do not think that case is to be regarded as authority for the proposition for which Mr. Bonner tried to use it. The true principle which ought to be applied is found stated in the judgment of Maugham L.J. and of all the judges in the Scottish case. I propose to follow their views and to decide that the policy holders of the class in respect of which the deposit was made and the general creditors of the company whose claims arise in connection with the business of that class have a preferential claim over other creditors on the investments representing the deposit made by the company under the Life Assurance Act of 1870 and the Industrial Assurance Act, 1923.

There is another question to be decided and that arises in this way. Before January 1, 1924, the company was carrying on ordinary life assurance business and industrial life insurance business and had made one deposit of 20,000*l.* in respect of both classes of business, that being the only obligation that the company was under until the Industrial Assurance Act, 1923, came into operation on January 1, 1924. Sect. 12 of that Act provides that industrial assurance business shall, for the purposes of the Assurance Companies Act, 1909,

(1) 1914 S. C. 320.

(2) [1914] 2 Ch. 77.

be treated as a separate class of assurance business, and accordingly a separate deposit shall be made in respect of that business as required by s. 2 of that Act. The consequence of that provision so far as this company is concerned, were there nothing more in the Act of 1923 than the provisions which I have read, would have been that the Hearts of Oak Assurance Co., would have had to make a separate deposit of 20,000*l.* and to that deposit the provisions of sub-ss. 2 and 3 of s. 3 of the Act of 1909, would have applied and that deposit would have become the deposit to which so far as preference was concerned the holders of industrial assurance policies would have been confined. Their rights would have been transferred from the deposit made under the Act of 1870 to the new deposit. That, of course, might have operated hardly in the case of persons who had made contracts of industrial assurance before 1924. So the following provision found a place in the Act of 1923, as a proviso to s. 14 : " nothing in this Act shall affect the liability of the industrial assurance fund or of the life assurance fund in the case of a company established before the commencement of this Act to the prejudice of persons interested in contracts entered into by the company before that date."

In the liquidation of this company there are creditors under ordinary life policies, creditors under industrial life policies entered into before January 1, 1924, and creditors under industrial life policies entered into after January 1, 1924.

The question has been argued on behalf of the ordinary life policy holders by Mr. Buckley, and his proposition is that, on the company going into liquidation, the holder of an industrial policy entered into before January 1, 1924, must, before he can make a claim against the deposit made under the Act of 1870, show that, if he is only admitted to prove against the deposit made under the Act of 1923 and against the general assets, he would get less than he would have got if the Act of 1923 had never been passed.

Mr. Bonner, who represented the pre-1924 industrial policy holders, contends that his clients have a preferential right not only against the deposit made under the Act of 1870 but also against the deposit made under the Act of 1923, on the ground that the effect of the legislation is to add to the security of the class of creditors which he represents the deposit which the company was compelled to make under the Act of 1923.

Those are the two substantial arguments between which a choice has to be made, and in my judgment the argument to be preferred, and which I shall adopt, is the argument advanced on behalf of the life policy holders by Mr. Buckley. It seems to give full effect to what the Legislature has said and does no violence to the language of the statute.

The order as drawn up was as follows :—

This court doth declare that the holders of ordinary life policies issued by the above-named company together with those creditors whose claims have arisen in whole or in part in connection with the ordinary life assurance business of the said company are entitled (subject to any prior claims of holders of industrial assurance policies issued before the year 1924 under or by virtue of the next following declaration) to a claim upon the investments representing the deposit of 20,000*l.* made by the said company in respect of its life assurance business under the Life Assurance Act 1870 (hereinafter called " the life deposit ") and all other assets (if any) constituting or applicable as one fund therewith in priority to all other creditors of the said company and that the holders of industrial assurance policies issued by the said Company together with those creditors whose claims have arisen in whole or in part in connection with the industrial assurance business of the said company have a prior claim over all other creditors of the said company upon the investments representing the deposit of 20,000*l.* made by the said company under the Industrial Assurance Act 1923 (hereinafter called " the industrial deposit ") and all other assets (if any) constituting or applicable as one fund therewith but so that in the case of any creditor whose claim has arisen in part only in connection with the business of one or other of those classes such priority shall extend only to that part of his claim which is applicable to business of that class.

And this court doth declare that holders of industrial assurance policies issued by the said company before the year 1924 are entitled in priority to all other creditors to receive out of the investments representing the life deposit and all other assets (if any) constituting or applicable as one fund therewith the amount (if any) by which the sums receivable by them out of the investments representing the industrial deposit and all other assets (if any) constituting or applicable as one fund therewith and the general assets of the said company on the footing of the preceding declaration fall short of the sums which they would have received out of the investments representing the life deposit and all other assets (if any) constituting or applicable as one fund therewith and the general assets of the said company if the business of the said company in respect of industrial assurance policies issued by the said company before the year 1924 and the said company's ordinary life assurance business had together continued to constitute the ordinary life assurance business of the said company.

Solicitors: *Kingsley Wood, Williams & Murphy; J. Tickle & Co.; J. R. Cort Bathurst; William Hurd & Son; Rule & Cooke.*

J. L. D.

BENNETT J.
1936
Feb. 4.

Approved. In re LYONS [1952] 1 Ch. 129

In re KINGCOME.

HICKLEY *v.* KINGCOME.

[1935. K. 960.]

Will—Annuity—Free of income tax—Sole income of annuitant—Refusal by annuitant to claim for relief in respect of income tax—Obligation to sign application form at request of trustees of will.

Where the trustees of a will requested an annuitant, to whom the annuity was payable free of income tax, to sign an application form claiming relief from income tax (the sum so recoverable being for the benefit of the testator's estate) and she refused to do so:—

Held, that she was a trustee of her statutory right to recover for the benefit of the testator's estate the tax overpaid in respect of her annuity and was bound at the request of the trustees to sign a proper application form for that purpose.

In re Pettit. Le Fevre v. *Pettit* [1922] 2 Ch. 765 applied.

SUMMONS.

By his will dated June 30, 1933, Henry Francis Kingcome gave to his trustees certain shares in Ayre & Kingcome, Ld., upon trust to retain them unsold until the death of the last survivor of certain named persons, including his wife, Annie Ellen Kingcome.

By clause 4 of the will he directed his trustees " out of the income of each year from my death of the shares hereinbefore given to them to pay to my said wife during her life in priority to all other annuities hereby or by any codicil hereto given an annuity of 365*l.* (clear of all death duties and income tax and so that such duties shall be payable out of the said income and not out of capital) to begin from my death and to be payable " in manner therein mentioned and subject thereto to pay four further annuities free of duty but not free of income tax ; and he made a provision, in the event of a surplus after payment of these annuities, for the payment of certain additional annuities.

The testator died on February 19, 1934.

Tax at the rate of 4*s.* 6*d.* in the 1*l.* was deducted from the income of the shares before it was received by the trustees.

The only income of the testator's widow was the annuity, and she was, therefore, in a position to claim allowances in respect of or repayment of part of the tax paid in respect of the annuity. The widow, however, refused to make application for any such repayment of tax, and the trustees took out a summons for the determination of the question (inter alia) whether in the event of her being entitled to but failing or refusing to claim and receive allowances in respect of or repayment in part of the income tax payable in respect of her annuity they, as executors and trustees of the will, were entitled and ought to deduct from the annuity the sum which she was from time to time entitled to claim by way of such allowances or repayment.

A. J. Belsham for the applicants.

J. H. Stamp for certain annuitants. The trustees have suffered a deduction of tax from the income which they have received in respect of their trust fund. In law the annuitant has received 470*l.* 19*s.* 4*d.* She is entitled to recover the statutory amount—namely, the whole of the tax on the first 100*l.* and half the tax on the next 225*l.* The result is that the estate has paid tax in respect of the income on 100*l.* which was not due and on 225*l.* of which half was not due. The effect of the statutes is that the trustees are obliged to pay too much to the revenue authorities. It was held in *In re Pettit* (1) that in such a case when the tax is recovered, so far as it is attributable to the trust income, it forms part of the trust estate.

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(1) [1922] 2 Ch. 765.

The trustees seek a declaration that they may sign a proper application form for that purpose, or for a declaration that the annuitant is bound to sign it. She is a quasi trustee of the fruit and of the means of obtaining the fruit. She is bound, on general principles, to sign the application form.

C. V. Rawlence for the testator's widow. If the lady is a trustee, the proper relief is a vesting order. A vesting order would not be objected to here. It is for the Legislature to alter the anomalous position.

M. Bowles and *A. P. Vanneck* for other parties interested.

BENNETT J. This is a curious point, and I doubt whether many cases like it are likely to arise in the future. The testator gave to his trustees certain shares held by him in a limited company on trust that they should be retained unsold until the death of the last survivor of certain named persons including his wife, and by clause 4 of his will he directed his trustees out of the income arising from these shares in each year to pay to his wife during her life in priority to all other annuities an annity of 365*l.* (clear of all death duties and income tax and so that such duties should be payable out of the said income and not out of capital) to begin from his death and to be payable in manner therein mentioned and subject thereto to pay four annuities of 200*l.*, 100*l.*, 200*l.*, and 50*l.* respectively, and he declared that those annuities should rank pari passu and if the income should in any year be insufficient to answer the same they should abate proportionately but if in any year the income of such year should be more than sufficient to provide all of the said annuities then his trustees should after paying or providing for the said annuities stand possessed of the income of any such year upon trust to pay certain additional annuities.

I am going to deal with the position in the second year after the death, because it raises the point for decision more clearly. The same point arises in the first year. The income received by the trustees during the second year from the shares of this company was 830*l.* 16*s.* Tax upon this sum at the standard rate of 4*s.* 6*d.* in the £ had been paid by the company to the Commissioners of Inland Revenue.

The annuities payable in the second year amount in all to 915*l.*, so that the income derived from the shares is not sufficient to pay the annuities in full.

Under the terms of the will, the annuity of the testator's widow has to be paid clear of income tax, and it is the duty of the trustees, having in their hands available money which had suffered deduction of tax, to pay to her the net sum of 365*l.*

According to the evidence the only income which the widow has is the annuity given to her by the will, and the consequence is that, that being her only income, she has the right to claim from the Inland Revenue Commissioners a return of the tax which has been paid upon the annuity which has been paid to her.

The law as laid down by Romer J. in *In re Pettit* (1) establishes that, if the widow made a claim for repayment of the tax which had been overpaid and received repayment, the sum which she received would be held by her on trust for the trustees of her husband's will and would be available for making good the deficiency in income to pay the annuities given by her husband's will which rank after her own. The evidence proves that the widow has the right to recover in respect of the second year 42*l.* 15*s.* If she recovered it and paid it to the trustees, as she would be bound to do, the deficiency would be reduced by 42*l.* 15*s.*

The widow has refused to make the claim for repayment, whether from ignorance, stupidity, or obstruction is immaterial. I think that in such circumstances the Court ought to do every thing it can to enable the income tax that has been overpaid to be recovered.

Mr. Stamp, for some of the annuitants, suggested that I should make a declaration which may or may not be followed by subsequent proceedings and which may enable the trustees of the will to recover the money. I can see no objection. What its consequences may be I do not know. It may enable the tax to be recovered. No satisfactory reason has been given for my not making it; and, therefore, I propose to make a declaration that the testator's widow is a trustee of her statutory right to recover for the benefit of the estate the tax operpaid in respect of her annuity and is bound at the request of the trustees to sign a proper form for that purpose.

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(1) [1922] 2 Ch. 765.

Solicitors: *Clowes, Hickley & Heaver; Marson & Toulmin.*

J. L. D.

BENNETT J.
1936
Feb. 14.

In re THORNBER.

CRABTREE *v.* THORNBER.

[1935. T. 1903.]

Will—Annuities charged on corpus—Direction to accumulate surplus income of residue—Gift of capital and accumulations to children of testator—Death of testator without issue—Partial intestacy—Accumulation not to be continued—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *s.* 49.

A testator, after bequeathing an annuity to his mother, directed his trustees out of the annual income of his residuary estate to pay an annuity to his wife, and he further directed that the surplus income of his residuary trust fund should be accumulated during the life of his wife or for twenty-one years from his death (whichever period was the shorter); and he directed that at the expiration of the period of accumulation his residuary estate should be held upon trust, as to both capital and income and the accumulations of such income, for his children.

The testator died without issue, and his widow claimed that she was entitled to call on the trustees to stop the accumulations of any surplus income of the residuary estate and deal with any such surplus income as on an intestacy. The testator's mother claimed that the accumulations ought to be continued:—

Held, that, subject to making provision in due course of administration for the annuity given to the testator's mother, the trustees ought not to accumulate the surplus income, but that it ought to be dealt with as income from the residuary estate undisposed of by the testator.

In re Sullivan. Dunkley v. *Sullivan* [1930] 1 Ch. 84 considered.

ADJOURNED SUMMONS.

By his will dated March 9, 1933, the testator, Ralph Thornber, who died on June 26, 1933, bequeathed to his mother an annuity of 52*l.* to be paid free of duty and income tax and, after a specific bequest and a specific devise, the testator devised and bequeathed all the residue of his real and personal estate on trust for sale and conversion and he directed his trustees out of the money arising from such sale and conversion to pay his debts, funeral and testamentary expenses and any legacy or annuity and the duties payable on any legacy or annuity bequeathed free of duty and subject thereto the trustees were to stand possessed of the residuary trust fund on the following trusts: "(*a*) to pay out of the annual income thereof the sum of 10*l.* per week to my said wife during her life provided always that in the event of my residuary trust fund being insufficient to pay to my said wife the said sum of 10*l.* per week my trustees shall have power to resort to the capital of my residuary trust fund to make up any such deficiency; (*b*) Subject thereto my trustees shall invest and accumulate the income of my residuary trust fund at compound interest by investing the same and the resulting income thereof as an accretion to the capital of my residuary trust fund during the life of my wife or for a period of twenty-one years from the date of my death (whichever period is the shorter) and at the expiration of such twenty-one years or at the death of my wife whichever shall first happen (hereinafter called the date of distribution) upon trust as to both capital and income and the accumulations of such income" for the children of the testator as thereinafter set forth.

The testator never had any children, and there were consequently no persons for whose benefit under the terms of the will accumulation could be made.

The question asked by the summons, which was taken out by the trustees of the will, was whether in the events which had happened the plaintiffs ought during the life of the testator's widow or for twenty-one years from the death of the testator, whichever period should be the shorter, to accumulate any surplus income of the residuary estate or whether such accumulations should cease and the surplus income be dealt with as income from the residuary estate undisposed of by the testator.

Roger Turnbull for the plaintiffs.

Cleveland-Stevens K.C. and *C. E. R. Abbott* for the testator's widow. The accumulation clause came to an end as soon as the object (children) failed. When the reason for the intention ceases the intention ceases. The trust for accumulation and the trust for children are one and the same trust. The testator died without ever having had any children, and the trust for accumulation is therefore inoperative: see *In re Sullivan.* (1) See also Wolstenholme and Cherry's Conveyancing Statutes, 12th ed., at p. 1506, where the meaning of the words "subject to the provisions contained in the will" contained in s. 49 of the Administration of Estates Act, 1925, are considered.

This trust for accumulation is not an effective provision of the will, subject to which that section will take effect. When the object for which the trust exists fails, the trust itself fails.

Sir Gerald Hurst K.C. and *Gerald Upjohn* for the testator's mother. In this case parties other than the widow have an interest. In *In re Sullivan* (1) the widow was the only person interested, and she disclaimed. The effect of the failure of children in the present case is to substitute for the reversionary gift to children a reversionary gift to the statutory next of kin. [They referred to *Cooper* v. *Cooper* (2) and *In re McKee. Public Trustee* v. *McKee.* (3)]

The mother has an interest in securing this fund. Besides being one of the next of kin she has a charge as an annuitant. It is necessary to consider the joint operation of the will and the statute. The words "subject thereto" mean "subject to the payment and satisfaction of the whole of the annuities." The effect in this will is to create a charge on the residue and the accumulations. [They referred to *In re Howarth. Howarth* v. *Makinson* (4) and *In re Watkins' Settlement. Wills* v. *Spence.* (5)

(1) [1930] 1 Ch. 84.
(2) (1874) L. R. 7 H. L. 53, 65.
(3) [1931] 2 Ch. 145.
(4) [1909] 2 Ch. 19.
(5) [1911] 1 Ch. 1.

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1936
THORNBER, *In re.*
CRABTREE *v.* THORNBER.

BENNETT J. The question to be decided arises under the will of the testator, Ralph Thornber, who died on June 26, 1933, having made his will on March 9, 1933. The question is one between the testator's mother on the one side and his widow on the other side. [His Lordship stated the facts, and continued:] The testator's mother as one of the next of kin argues that the accumulation should continue for twenty-one years, and the question is whether that argument is right. The question turns on the true construction of s. 49 of the Administration of Estates Act, 1925. The testator in this case has only partially disposed of his property. The section reads as follows: "Where any person dies leaving a will effectively disposing of part of his property, this Part of this Act shall have effect as respects the part of his property not so disposed of subject to the provisions contained in the will. . . . ."

The question is whether the provision in the will for the accumulation of the income of his residue for a term of years is a provision subject to which the Act is to have effect.

On the construction of the section of the Act I am not without guidance. The question of the true construction of the section came before Maugham J. in *In re Sullivan.* (1) He was dealing with a case of this kind; the testator, after pecuniary legacies and specific bequests, disposed of the whole of his residuary personalty, including royalties in respect of copyrights, which he directed to be treated as capital, to his trustees, upon trust to pay the income to his wife for life, and after her death in trust for his children or remoter issue. He died without having had children, and the question arose whether, if the widow disclaimed her life interest under the will, royalties received by the trustees in respect of copyright or other interests comprised in the estate would be income or capital. Maugham J. held that in s. 49 of the Administration of Estates Act, 1925, the words "subject to the provisions contained in the Will" should be construed to refer to the effective provisions therein contained. In construing the section he says: "In the present case the

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(1) [1930] 1 Ch. 84, 87.

BENNETT J.

1936

THORNBER, *In re.* CRABTREE *v.* THORNBER.

provision as to royalties was inserted in the will in order to diminish the widow's life interest for the benefit of children who, in the event, do not exist. It was clearly not inserted in order to determine the nature of interests to be taken in property in respect of which he died or might die intestate. It is true that s. 49 of the Administration of Estates Act, 1925, might be construed to mean that the provisions of that part of the Act shall have effect subject to the whole of the provisions in the will, including any provisions which become inoperative by virtue of disclaimer, lapse, or other event. I am satisfied that that is not the true construction of the section. The phrase 'subject to the provisions contained in the will' is intended to shew that the provisions of the Act relating to property not disposed of by will must take effect subject to all the provisions of the will which remain operative and effective."

Here the class of person for whom these provisions were inserted does not and never did exist. The provision, therefore, in my judgment, never became operative or effective. Following the decision of Maugham J., it seems to me to be clear that the effect of s. 49 is that property is to be disposed of under the Act without regard to inoperative provisions.

Sir Gerald Hurst contends that, even on that interpretation, the testator's mother, who has an annuity of 52*l.* given to her by the will, has a right to say that the provision as regards accumulation shall be carried into effect, because she has a charge on the accumulations. The ground of the argument is that the residue is given subject to the annuity given to the mother. I agree that the annuity is charged on corpus, but before the provisions which Sir Gerald Hurst desires to have put into operation ever come into existence provision has to be made for payment of the mother's annuity: there is no residue until that is done; there is nothing to which the provision for accumulation can apply, and it is only when proper provision has been made for the mother's annuity that there is any residue.

I see no ground on which I can hold that if the mother's annuity is properly provided for, the mother has any right

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to insist on the provision for accumulation, inserted solely for the benefit of non-existent children, being carried out, and I direct that, subject to proper provision being made for the mother's annuity, the trustees ought not to accumulate the surplus income.

Solicitors: *Williamson, Hill & Co., for Clarkson, Thomas & Collinson, Halifax; Robbins, Olivey & Lake, for Longbothams & Bradley, Hebden Bridge.*

J. L. D.

WITH *v.* O'FLANAGAN.

C. A.

1936

March 12, 13, 16.

[1934. W. 1358.]

Contract—Rescission—Representation by vendor true at commencement of negotiations—Change of circumstances before signature of contract—Continuing representation—Vendor's duty to disclose change of circumstances.

In January, 1934, negotiations were entered into for the sale of a medical practice, and the vendor then represented to the purchasers that the takings of the practice were at the rate of 2000*l.* per annum. The contract was signed on May 1, 1934, but by that date the circumstances had changed, as the practice had fallen off owing to the illness of the vendor and the employment of several locum tenentes. The change of circumstances was not disclosed to the purchasers, and when they took possession on that date they found that the practice was almost non-existent. They thereupon commenced an action for rescission of the contract.

Bennett J. held that, as the contract was not a contract uberrimae fidei, the case was the ordinary one of parties to a contract having to prove, before they could obtain rescission, that the representations which induced them to act were in fact untrue at the time when they were made; that in this case the representation was true at the time when it was made, and the action failed.

On appeal:—

Held (reversing the decision of Bennett J.), that the representation was made with a view to induce the purchasers to enter into the contract and must be treated as continuing until the contract was signed, and that it was the duty of the vendor to communicate the change of circumstances to the purchasers.

Traill v. *Baring* (1864) 4 De G. J. & S. 318 and *Davies* v. *London and Provincial Marine Insurance Co.* (1878) 8 Ch. D. 469, considered and applied.

APPEAL from a decision of Bennett J.

The action was brought by the plaintiffs for the rescission of a contract dated May 1, 1934, to purchase from the first defendant, Dr. O'Flanagan, his medical practice. The practice was introduced to the plaintiffs by a medical agency in January, 1934, and the agent then represented that the practice was for sale and that it was " doing at the rate of 2000*l.* a year " and that Dr. O'Flanagan was asking 4000*l.* for it, " that is to say, two years' purchase." [There was also a representation with regard to the panel patients which is immaterial for the purposes of this report.] The plaintiffs thereupon saw Dr. O'Flanagan, who confirmed this statement. In the interval between January, 1934, and May 1, 1934, when the contract was signed, Dr. O'Flanagan was away seriously ill from time to time, and during his absence the practice was on each occasion looked after by a locum tenens. The result was that the receipts fell off considerably, and it appeared from the evidence that during the three weeks preceding May 1, 1934, the practice was not producing more than an average of 5*l.* a week, and that of that total of 15*l.*, 10*l.* came from the payments of a single patient.

In April, 1934, the plaintiffs were told that Dr. O'Flanagan was absent from the practice and that the practice was in the hands of a locum, and by a letter dated April 12, 1934, the plaintiffs' solicitors wrote to Dr. O'Flanagan's solicitors as follows : " We understand that a locum is looking after Dr. O'Flanagan's practice at the moment, and this, of course, is a matter of some concern to our clients. If the purchase is going through they feel very strongly that it should be completed at the earliest possible moment, possession being given of both consultation rooms as early as possible. It, however, will not be practicable to complete the purchase of the house before the 1st June." On April 16, 1934, the plaintiffs' solicitors replied: "We beg to advise you that we saw Dr. O'Flanagan on Saturday evening last on your letter of the 12th instant . . . . We are . . . . advised that the present locum is quite efficient and is looking after the practice satisfactorily." The plaintiffs did not know until after the date when the agreement was signed that there had been more than one locum tenens in charge of the practice.

On May 1, 1934, the agreement was signed, but when the plaintiffs took possession on the evening of that day they found that there was substantially no practice being carried on. They stayed during two or three days, but finding that no private patients came they wrote to Dr. O'Flanagan's solicitors on May 3, 1934, a letter in which they stated: "Instead of the average taking being on the basis of 2000*l.* a year as represented by your client, it appears that the last three weeks have averaged about 5*l.* a week. . . . ." To that Dr. O'Flanagan's solicitors replied on May 4: "Our client states emphatically that he only represented the takings to be 2000*l.* a year for the period of a little over two years ending at the end of last year, during which he was in control of the practice. No representations were made about the present state of the practice."

On May 4, 1934, the plaintiffs issued their writ in the present action claiming rescission and repayment of the purchase money. It was admitted that the statement as to the practice producing 2000*l.* a year was true at the time when it was made, and the question was whether the change in the circumstances ought to have been communicated to the plaintiffs by Dr. O'Flanagan before they were allowed to close the transaction.

On July 16, 1934, Dr. O'Flanagan died, and the action was by order of the Court continued against his personal representatives.

Bennett J., after considering *Traill* v. *Baring* (1), held that that case was confined to cases uberrimae fidei or to cases where there had been a statement of intention, and that the representations in the present case were representations of

(1) 4 De G. J. & S. 318.

existing facts which were true at the time when they were made and which never, under any circumstances, could become untrue, and that the case was the ordinary case of parties to a contract having to prove before they could obtain rescission that the representations made to them and which induced them to act were representations of existing facts which were in fact untrue at the time when they were made; and he dismissed the action with costs.

The plaintiffs appealed. The appeal was heard on March 12, 13 and 16, 1936.

A. F. Topham K.C. and *H. S. G. Buckmaster* for the appellants. The circumstances with regard to the state of the practice having altered between January, 1934, when the representation was made to the plaintiffs, and May 1, 1934, when the contract was signed, it was the duty of the defendant to disclose that change to the plaintiffs before allowing them to sign.

The authorities show that where a person makes a representation to another upon which that person relies and subsequently to the knowledge of the person making it the circumstances change so that the person to whom the representation is made might have altered his position had he known of it, it is the duty of the person making the representation to communicate the change of circumstances to the other person: see *Traill* v. *Baring* (1); *In re Scottish Petroleum Co.* (2); *Davies* v. *London and Provincial Marine Insurance Co.* (3) This rule is of general application and is not confined to cases uberrimae fidei, such as contracts of insurance.

Further the plaintiffs were entitled to treat the representation as continuing up to the time of the signing of the contract: *Smith* v. *Kay* (4); *Brownlie* v. *Campbell.* (5)

[LORD WRIGHT M.R. referred to *Reynell* v. *Sprye.* (6)]

Here the plaintiffs knew nothing of the change of circumstances, and it is clear on the evidence that Dr. O'Flanagan or those acting for him must have been fully aware of all the facts up to the end.

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(1) De G. J. & S. 318, 329.
(2) (1883) 23 Ch. D. 413, 438.
(3) 8 Ch. D. 469.
(4) (1859) 7 H. L. C. 750, 769.
(5) (1880) 5 App. Cas. 925.
(6) (1852) 1 De G. M. & G. 660, 708.

H. C. Dickens (with him *J. W. Morris K.C.*) for the respondents. I cannot put my argument better than the way it has been stated by Bennett J. in his judgment. The representation was that the average takings of the practice were 2000*l.* a year at the date when the representation was made.

[LORD WRIGHT M.R. I do not construe the representation as limited in the way you suggest to the time when the representation was made.]

This is not a case in which uberrima fides is required.

[ROMER L.J. Where a person makes a representation with a view to induce another to enter into a contract at a future date he must be taken to intend that the effect of that representation should continue.]

There is no dispute in this case as to what the representation was, and I am content to rely on the admission of the plaintiffs that the statement was true when it was made. Dr. O'Flanagan must not, however, be taken as representing that that state of facts will continue. No man will predict that his present state of affairs will continue in the future. The only data that Dr. O'Flanagan could give were those based on the past—namely, that the practice had for a certain period been doing 2000*l.* a year at the time the representation was made. At that moment that representation was true. In order that the plaintiffs should succeed it is essential that they should establish that at the time the representation was made the practice was not doing 2000*l.* a year, and this they have failed to do. Further there was no evidence that the practice was not doing 2000*l.* a year when the plaintiffs went into possession. Then as to the duty of Dr. O'Flanagan to disclose a change of circumstances, it is submitted that the rule of caveat emptor applies. It is true that in *Davies* v. *London and Provincial Marine Insurance Co.* (1) Fry J. says: "If a statement has been made which is true at the time, but which during the course of the negotiations becomes untrue, then the person who knows it has become untrue is under an obligation to disclose to the other the change of circumstances." That statement, however, is no authority for the proposition that if a person makes a statement which was true at the time it was made and still remains true he is bound to disclose a subsequent change of circumstances. Here the statement made by Dr. O'Flanagan that the practice was bringing him in 2000*l.* a year was true when made and still remains true. *Traill* v. *Baring* (1) merely decides that where a representation has become untrue by reason of a change of circumstances the fact must be disclosed. See also *Smith* v. *Kay.* (2)

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(1) 8 Ch. D. 469, 475.

[LORD WRIGHT M.R. referred to the statement as to *Smith* v. *Kay* (3) in Halsbury's Laws of England, vol. xx., p. 678, note (*k*), and said that statement appeared to be in accordance with the authorities.]

I know of no statement which goes beyond the dictum of Fry J. in *Davies* v. *London and Provincial Marine Insurance Co.* (4)

A. F. Topham K.C. was not called upon to reply.

LORD WRIGHT M.R. stated the facts and continued: These being the facts, the plaintiffs have, in my opinion, established the representations of fact which I have already stated: they have established that a material alteration in the position had taken place between the date of those representations and the date at which the contract was completed and they have also established that no communication was made by Dr. O'Flanagan or anybody on his behalf of that change of circumstances. But that all the facts were known to either Dr. O'Flanagan or his agent I have no doubt at all. Those two letters I have cited are letters of a responsible person who has consulted with his client who was capable of giving advice, and knew exactly what was happening. That being so, on any view of the position, I think that the change in circumstances ought to have been communicated

(1) 4 De G. J. & S. 318.
(2) 7 H. L. C. 750, 769.
(3) 7 H. L. C. 750.
(4) 8 Ch. D. 469, 475.

to the plaintiffs before they were allowed to close the transaction. Instead of that, they were thrown off the scent and induced not to pursue, and did not pursue, their doubts any further. That is not in a sense essential; the essential and material representation remained unqualified and uncontradicted and in truth it was acted upon eventually when the bargain was concluded on May 1. The learned judge finds as to the change in the position: "It has been proved by the plaintiffs that during that period (some three weeks) when Dr. Stern was looking after the practice, the takings amounted to about 5*l.* a week, and that does not seem to me to be at the rate of 2000*l.* a year." I agree with that view of the position. A representation is not like a warranty; it is not necessary it should be strictly construed or strictly complied with; it is enough if it is substantially true; it is enough if it is substantially complied with. If it is not substantially complied with then the Court finds itself in the range of misrepresentation and must give effect to that position if it is satisfied that the plaintiffs acted upon the representation in concluding a bargain, about which there can be no doubt in this case.

As to the law, which has been challenged, I want to say this. I take the law to be as it was stated by Fry J. in *Davies* v. *London and Provincial Marine Insurance Co.* (1) where it is perhaps most fully expressed. In that case certain friends of an agent had agreed to deposit a sum of money for what was alleged to have been defaults on his part. The company who had employed him were under the belief and were advised that the default of the agent constituted felony, but they were later advised that these acts did not amount to felony and they withdrew the order for his arrest, and then still later in the day the friends of the agent agreed to deposit a sum of money on the footing of what they had been told earlier in the day before the arrest had been withdrawn—these statements had not been corrected—and on that footing it was held by Fry J. "that the change of circumstances ought to have been stated to the intending sureties, and that the

(1) 8 Ch. D. 469.

agreement must be rescinded and the money returned to the sureties." I need not read the whole of the passage in the judgment, but I need only refer to one or two points. The learned judge points out (1): "Where parties are contracting with one another, each may, unless there be a duty to disclose, observe silence even in regard to facts which he believes would be operative upon the mind of the other; and it rests upon those who say that there was a duty to disclose, to shew that the duty existed." Then the learned judge points out that in many cases there is such a duty as between persons in a confidential or a fiduciary relationship where the pre-existing relationship involves the duty of entire disclosure. Then his Lordship says: "In the next place, there are certain contracts which have been called contracts uberrimae fidei where, from their nature, the Court requires disclosure from one of the contracting parties." The learned judge refers to contracts of partnership and marine insurance. Then he goes on (2): "Again, in ordinary contracts the duty may arise from circumstances which occur during the negotiation. Thus, for instance, if one of the negotiating parties has made a statement which is false in fact, but which he believes to be true and which is material to the contract, and during the course of the negotiation he discovers the falsity of that statement, he is under an obligation to correct his erroneous statement; although if he had said nothing he very likely might have been entitled to hold his tongue throughout." Then he adds what was material in that case and what is material in this case: "So, again, if a statement has been made which is true at the time, but which during the course of the negotiations becomes untrue, then the person who knows that it has become untrue is under an obligation to disclose to the other the change of circumstances."

Very much the same was said by the same learned judge, when a Lord Justice, in *In re Scottish Petroleum Co.* (3) The facts there were very simple. A man took shares in a company on the faith of a statement that the company had four

(1) 8 Ch. D. 474.

(2) 8 Ch. D. 475.

(3) 23 Ch. D. 413, 438.

directors, one of whom was personally known to him and in whom he had confidence. That was a representation of the existing fact, perfectly true at the time. He applied for shares on the faith of that representation, but before that application was made the particular director and one other had ceased to be directors and he claimed to be entitled to withdraw his application and he claimed an order rescinding the allotment of shares which had been made to him on his application. Fry L.J. held that prima facie the applicant had a right to repudiate his bargain by reason of the change of circumstances. A complication arose because the allotment had been made and the applicant, instead of claiming at once to be relieved and to have his name taken from the list of members of the company, stood by for some time and then applied at a later stage. His claim failed because of that delay. Fry L.J. says in terms that apart from that delay he would have had the right to be relieved. The learned Lord Justice quotes at length a very important passage from a judgment of Turner L.J. in *Traill* v. *Baring* (1) in confirmation of his view. Perhaps I ought to read that passage. This is what Turner L.J. says: "I take it to be quite clear, that if a person makes a representation by which he induces another to take a particular course, and the circumstances are afterwards altered to the knowledge of the party making the representation, but not to the knowledge of the party to whom the representation is made, and are so altered that the alteration of the circumstances may affect the course of conduct which may be pursued by the party to whom the representation is made, it is the imperative duty of the party who has made the representation to communicate to the party to whom the representation has been made the alteration of those circumstances; and that this Court will not hold the party to whom the representation has been made bound unless such a communication has been made." In these cases—I need not refer to others on this point—the position is based upon the duty to communicate the change of circumstances.

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(1) 4 De G. J. & S. 318, 329.

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The matter, however, may be put in another way though with the same effect, and that is on the ground that a representation made as a matter of inducement to enter into a contract is to be treated as a continuing representation. That view of the position was put in *Smith* v. *Kay* (1) by Lord Cranworth. He says of a representation made in negotiation some time before the date of a contract : " It is a continuing representation. The representation does not end for ever when the representation is once made ; it continues on. The pleader who drew the bill, or the young man himself, in stating his case, would say, Before I executed the bond I had been led to believe, and I therefore continued to believe, that it was executed pursuant to the arrangement."

The underlying principle is also stated again in a slightly different application by Lord Blackburn in *Brownlie* v. *Campbell.* (2) I need only quote a very short passage. Lord Blackburn says : " when a statement or representation has been made in the *bonâ fide* belief that it is true, and the party who has made it afterwards comes to find out that it is untrue, and discovers what he should have said, he can no longer honestly keep up that silence on the subject after that has come to his knowledge, thereby allowing the other party to go on, and still more, inducing him to go on, upon a statement which was honestly made at the time when it was made, but which he has not now retracted when he has become aware that it can be no longer honestly persevered in." The learned Lord goes on to say that would be fraud, though nowadays the Court is more reluctant to use the word " fraud " and would not generally use the word " fraud " in that connection because the failure to disclose, though wrong and a breach of duty, may be due to inadvertence or a failure to realize that the duty rests upon the party who has made the representation not to leave the other party under an error when the representation has become falsified by a change of circumstances. This question only occurs when there is an interval of time between the time when the representation is made and when it is acted upon by the

(1) 7 H. L. C. 750, 769.

(2) 5 App. Cas. 925, 950.

party to whom it was made, who either concludes the contract or does some similar decisive act; but the representation remains in effect and it is because that is so, and because the Court is satisfied in a proper case on the facts that it remained operative in the mind of the representee, that the Court holds that under such circumstances the representee should not be bound.

I have discussed the law at some little length because the cases to which I have referred show, I think, that this doctrine is not limited to a case of contracts uberrimae fidei or to any cases in which owing to confidential relationship there is a peculiar duty of disclosure; on the contrary, the passage which I read from the judgment of Fry J. shows quite clearly that he distinguishes this consequence as one which arises in cases in which if the party was silent, there would be no duty to disclose at all. I mention that because Bennett J., referring to *Traill* v. *Baring* (1), says: " *Traill* v. *Baring* (1) I think is a case which either falls into a class of case in which the contract is one in which the law requires the utmost good faith (it was a case in which the contract sought to be set aside was one of insurance) or it is a case which is in principle limited to a case in which there has been a representation with respect to the intention and the parties to the contract relied upon the intention which one of the parties represented himself to have had being continued up to the time when the contract was made." With the greatest respect to the learned judge, I cannot find in the authorities, so far as I know them or so far as they have been brought to my attention, any justification for these limitations. It is true *Traill* v. *Baring* (1) was a case of contract of insurance, but the illustration which Turner L.J. proceeds to give is not a contract of insurance but an ordinary contract, and the other cases to which I have referred, quite apart from the statements of the principle, are cases which are not in any sense contracts uberrimae fidei.

On these grounds, with great respect to the learned judge, I think he ought to have come to the conclusion that the plaintiffs have established their case and there ought to be

(1) 4 De G. J. & S. 318.

a declaration rescinding the contract with the consequences which follow upon such a declaration.

Romer L.J. I agree. The only principle invoked by the appellants in this case is as follows. If A. with a view to inducing B. to enter into a contract makes a representation as to a material fact, then if at a later date and before the contract is actually entered into, owing to a change of circumstances, the representation then made would to the knowledge of A. be untrue and B. subsequently enters into the contract in ignorance of that change of circumstances and relying upon that representation, A. cannot hold B. to the bargain. There is ample authority for that statement and, indeed, I doubt myself whether any authority is necessary, it being, it seems to me, so obviously consistent with the plainest principles of equity.

The only questions therefore that we have to decide in the present case are, first, what was the representation made on January 21, secondly, had that representation, owing to the change of circumstances to which the Master of the Rolls has referred, become untrue by May 1 when the contract was entered into? The representation was this. It was made originally by Dr. O'Flanagan's agent and subsequently confirmed by Dr. O'Flanagan himself that the practice was doing at the rate of 2000*l.* a year and he, that is Dr. O'Flanagan, was asking 4000*l.* for it, that is to say, two years' purchase. The reference to two years' purchase makes it plain to me that the statement that the practice was doing at the rate of 2000*l.* a year was intended to be a statement as to an essential feature of the practice, that is to say, a representation to the proposing purchasers that if they bought the practice they would be buying what might properly be called a 2000*l.* a year practice. Had that statement become untrue by May 1? It appears to me plainly it had. It is stated by Dr. Stern, who was the locum tenens during the last of the three periods that Dr. O'Flanagan was unwell, that he only took on an average 5*l.* a week during three weeks and, as the Master of the Rolls pointed out, of that

15*l.*, 10*l.* was received from one patient. It is plain from the evidence of the two plaintiffs who were called, who intended purchasing the practice and entered into the practice on May 1, that the practice was a dead one. Under those circumstances, with the greatest respect to Bennett J., it appears to me that the plaintiffs are entitled to succeed in the action and that this appeal should be allowed.

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CLAUSON J. I agree.

Appeal allowed.

Solicitors for appellants: *Merton Jones, Lewsey & Jefferies.*
Solicitors for respondents: *David Morris & Co.*

W. I. C.

In re IMPERIAL CHEMICAL INDUSTRIES, LIMITED.

[00281 of 1935.]

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EVE J.
July 25, 26, 30;
Nov. 5, 6, 8, 13;
Dec. 20.

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Mar. 9, 10, 11, 12;
Apr. 1.

Company—Reduction of Capital—Re-organization of Capital—Conversion of deferred shares into ordinary shares—Separate Class Meetings—Disclosure of directors' share holdings—Sanction of Court—Companies Act, 1929 (19 & 20 *Geo.* 5, *c.* 23), *ss.* 55, 56.

Imperial Chemical Industries, Ld., which was registered with a capital of 95,000,000*l.*, divided into preference, ordinary and deferred shares, presented a petition for the confirmation by the Court of a reduction of capital involving conversion of the deferred shares into ordinary shares, which had been approved by large majorities of the shareholders in general meeting and of the holders of ordinary and deferred shares.

The scheme proposed to reduce the capital of the company to 89,565,859*l.* by cancelling 5*s.* per share on each of the 21,736,564 deferred shares of 10*s.* each, and converting the deferred shares, after reduction, into ordinary shares of 1*l.* by exchange of four deferred shares for one ordinary share. The proposed reduction was supported by the directors, not on the ground of any loss of capital (of which there was no evidence), but in order to simplify the capital structure of the company. Under the articles the profits of the company were distributable, first in payment of a dividend of 7 per cent. per annum on the cumulative preference shares, next in paying a dividend of 7 per cent. per annum on the ordinary shares, and finally the balance of the profits was to be distributed in such a manner that the ordinary shareholders received approximately twice the amount paid to the deferred shareholders. The object of the scheme was to abolish the class of deferred shares by exchanging them, at the proposed ratio, into ordinary shares.

The memorandum and articles of the company provided that the special rights attached to any class of shares should not be affected or abrogated without the sanction of a separate meeting of the holders of shares of the class.

A circular explaining the details of the scheme was sent by the board to all shareholders, and meetings to obtain the shareholders' approval were convened and held on May 1, 1935, of which the first was an extraordinary meeting of all shareholders, when the chairman made a speech commending the scheme, which speech he proposed and intended to treat as a speech in relation to that meeting and the two subsequent class meetings. A poll was taken at the conclusion of this meeting, and afterwards meetings purporting to be separate class meetings first of the ordinary shareholders and then of the deferred shareholders were held. At the meeting of the deferred shareholders the resolution was defeated on a show of hands, but carried by the requisite majority on a poll being taken. No special precautions were taken to prevent shareholders, other than those of the particular class concerned, being present in the hall during the holding of the two class meetings, but there was no evidence that any shareholder voted out of his own class.

The petition was opposed by some of the deferred shareholders who contended for various reasons that the scheme involved in the reduction was unfair to that class and was not such as an ordinary business man would approve, and ought not therefore to be confirmed by the Court :—

Held (by the Court of Appeal) : (1.) That the company having power under its articles to reduce its capital by paying off capital, cancelling lost capital, reducing the liability on its shares, "or otherwise as may seem expedient," was entitled to reduce its capital in any manner authorized by statute.

Held (by Eve J. and the Court of Appeal) : (2.) That the presence at a separate meeting of the holders of one class of shares of other shareholders of a different class, not voting at it either by show of hands or on a poll, did not invalidate the meeting as a separate class meeting, or the poll taken thereat.

(3.) That the circular issued to the shareholders contained a full and fair explanation of the scheme free from ambiguity, and

(4.) That the directors were not under any duty to the shareholders to disclose to them in the circular explaining the scheme their holdings or respective proportional interests in ordinary and deferred shares.

Held, therefore, that the scheme having been fully and properly explained to the shareholders without concealment of any relevant facts, and approved, on a poll being taken, by the requisite majorities of each class, the reduction of capital ought properly to be confirmed by the Court.

The principles laid down in *In re Dorman, Long & Co., Ld.* [1934] Ch. 635, discussed and approved.

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PETITION.

The petition was presented by the company under the Companies Act, 1929, ss. 55 and 56, for the confirmation by the Court of a reduction of capital to be effected by a special resolution passed at an extraordinary general meeting of the company held on May 1, 1935. The resolution was passed in order to effect a reduction of the capital of the company from 95,000,000*l.*, divided into preference, ordinary and deferred shares, to 89,565,859*l.*, divided into the same number of shares of each class by cancelling paid up capital to the extent of 5*s.* per share upon each of the 21,736,564 deferred shares of 10*s.* each and by reducing the nominal amount of each of such deferred shares from 10*s.* to 5*s.* Another resolution was passed whereby the existing rights and privileges attaching to the ordinary shares and the 5*s.* deferred shares were to be varied by the amalgamation of the two classes into one class of ordinary shares ranking pari passu for purposes of dividend and return of capital. The deferred shares were then to be consolidated into shares of 1*l.* each and the capital of the company was to be increased to its former amount of 95,000,000*l.* by the creation of 5,434,141 additional unclassified shares of 1*l.* each, not to rank in priority to the existing preference stock or shares, but capable of being issued as ordinary shares.

The profits of the company had under art. 113 of the company's articles of association been divisible as follows: first in paying a dividend at the rate of 7 per cent. per annum on the cumulative preference shares; secondly, in the payment of a non-cumulative dividend at the rate of 7 per cent. per annum on the ordinary shares. The balance of the profits available for distribution was to be distributed so that the total amount distributed in respect of the ordinary shares should be, as nearly as possible, twice the total amount distributed in respect of the deferred shares, the dividend in each class being calculated to the nearest one-quarter per cent. The main object of the reduction of capital was to get rid of this unequal distribution of the balance of the profits by abolishing deferred shares as a class.

Other resolutions were passed effecting alterations of the articles.

The memorandum and articles of association of the company contained the following clauses :—

Memorandum, Clause 6. The share capital of the company is 65,000,000*l.* divided into 47,320,000 shares of 1*l.* each and 35,360,000 shares of 10*s.* each, with power to increase and with power from time to time to issue any shares of the original or new capital with any preference or priority in the payment of dividends or the distribution of assets, or otherwise, over any other shares, whether deferred, ordinary or preference, and whether issued or not, and to vary the regulations of the company as far as necessary to give effect to any such preference or priority, and upon the subdivision of a share, to apportion the right to participate in profits or surplus assets, or the right to vote in any manner as between the shares resulting from such subdivision, but so that unless otherwise provided by the terms of issue of any shares any preferential or other special rights for the time being annexed to any class of shares shall not be affected or abrogated without the sanction of a separate meeting of the holders of shares of the class held pursuant to the articles registered herewith.

Art. 44. The company may by special resolution reduce its capital by paying off capital, cancelling capital which has been lost or is unrepresented by available assets, reducing the liability on the shares, or otherwise, as may seem expedient, or it may by ordinary resolution cancel shares not taken or agreed to be taken by any person. Capital may be paid off upon the footing that it may be called up again or otherwise.

Art. 71. The holders of any class of shares may at any time and from time to time, and whether before or during liquidation, by an extraordinary resolution passed at a meeting of such holders, consent on behalf of all the holders of shares of the class to the issue or creation of any shares ranking equally therewith, or having any priority thereto, or to the abandonment of any preferences or priority, or of any accrued dividend or dividends, or the reduction for any time or permanently of the dividends payable thereon, or to the amalgamation into one class of the shares of any two or more classes, or to the subdivision of shares of one class into shares of different classes, or any alterations in these articles varying or taking away any rights or privileges attached to shares of the class, or to any scheme for the reduction of the company's capital affecting the class of shares in a manner not otherwise authorized by these articles, or to any scheme for the distribution (though not in accordance with legal rights) of assets in money or in kind in or before liquidation, or to any contract for the sale of the whole or any part of the company's property or business determining the way in which as between the several classes of shareholders the purchase consideration shall be distributed, and generally consent to any alteration, contract, compromise, transaction or arrangement which the persons voting thereon could if sui juris and holding all the shares of the class consent to or enter into, and such resolution shall be binding upon all the holders of shares of the class.

Art. 72. Any meeting for the purpose of the last preceding clause shall be convened and conducted in all respects as nearly as possible in the same way as an extraordinary general meeting of the company; provided that no member, not being a director, shall be entitled to notice thereof or to attend thereat, unless he be a holder of shares of the class intended to be affected by the resolution, and that no vote shall be given except in respect of a share of that class, and that the quorum at any such meeting shall (subject to the provisions as to an adjourned meeting hereinbefore contained) be members or corporation representatives holding or representing by proxy one-tenth of the issued shares of that class, and that at any such meeting immediately upon a declaration of the result of the show of hands a poll may be demanded in writing by the chairman or by any five members or corporation representatives holding one-tenth of the issued shares of that class present in person or by proxy and entitled to vote at the meeting.

At an extraordinary general meeting of the company held at the Central Hall, Westminster, on May 1, after the conclusion of the ordinary general meeting, the chairman, Sir Harry McGowan, announced that that meeting would be followed by two class meetings, first a class meeting of the ordinary shareholders, and secondly a class meeting of the deferred shareholders. At those two class meetings those two classes of shareholders would be asked in turn to vote upon an extraordinary resolution approving of the proposed reorganization and reduction of the company's share capital in so far as those proposals amounted to a variation of the rights and privileges attaching to the ordinary shares and to the deferred shares respectively.

The special resolution proposed at the extraordinary general meeting, following considerable discussion, was lost on a show of hands, but the chairman demanded a poll and directed that it should be taken forthwith. The meeting was then adjourned to a later hour and a separate meeting of the holders of the ordinary shares followed. At this meeting the resolution was declared carried on a show of hands, but a poll was directed to be and was taken. A further separate meeting of the holders of the deferred shares was held immediately after this poll was taken, the chairman intimating that he had already made his speech to all classes. On the resolution being put to this meeting it was lost on a show of hands, but a poll was demanded and taken. The voting figures for the three meetings were as follows: Extraordinary general meeting, 22,803,402 votes in favour and 2,135,971 against the resolution; meeting of ordinary shareholders, 18,663,383 in favour and 1,136,163 against; meeting of deferred shareholders, 3,722,414 in favour and 1,095,681 against the resolution.

An affidavit was made in support of the petition by Sir William McLintock, Bart., chartered accountant, whose firm was one of the auditors to the company, in which he said that in his opinion the existing capital structure of the company, under which the share capital was divided into preference, ordinary and deferred shares, was unsatisfactory having regard more particularly to the dividend and winding-up rights, and he was strongly of opinion that a scheme for the simplification of the capital structure of the company by the amalgamation of the ordinary and deferred shares into shares of one class would facilitate the financial direction of the company, and prove to be in the interests of all classes of shareholders. In his opinion the scheme was fair and equitable between the two classes of ordinary and deferred shareholders. Until payment of a dividend of 9¼ per cent. on the ordinary shares could be expected the scheme was to the advantage of the deferred shareholders, whereas with an ordinary dividend in excess of that figure the scheme was in favour of the ordinary shareholders. In his opinion the scheme did not unfairly favour one class of shareholders at the expense of the other. This affidavit was supported by other affidavits, including one by Sir William Albert Wyon, chartered accountant, to much the same effect. If the scheme had been in operation in 1934 the deferred shareholders, instead of receiving a dividend of only 2 per cent., would have received one of 4 per cent. The petition was opposed by a number of holders of deferred shares represented by a committee, the chairman of which was Mr. John Kennedy Carruth. The affidavits in support of the opposition included an affidavit made by Mr. Henry Morgan, an accountant, who criticized the scheme as being inequitable to the deferred shareholders on several grounds. These grounds were, stated shortly, the probability of increased earnings in the future, the large appropriations by the company in the past to general and obsolescence reserves and the alleged under-statement of the true profits of the company in the annual published accounts. He also criticized the directors' circular to the shareholders as lacking in certain essential information to enable the deferred shareholders to arrive at a decision. Several of the deponents were examined and cross-examined at some length.

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Sir William Jowitt K.C., *H. J. Wallington K.C.* and *H. O. Danckwerts* for the opposing shareholders.

The scheme is not a fair one. It unduly favours the ordinary shareholders at the expense of the deferred shareholders. The shareholders should have been informed at the meetings by the chairman, but were not so informed, that the directors held large amounts of ordinary shares, and had only very small holdings of deferred shares. This fact was material, but was not stated in the circulars to the shareholders or at the meetings: see *In re Dorman, Long & Co., Ld.* (1)

The meetings were not, properly speaking, separate class meetings. They were really one meeting divided into sections. All classes of shareholders were present all through the combined meeting, and it was not suggested that the shareholders, other than those of the particular class entitled at the time to be present and vote, should withdraw.

The statistical statement sent out with the report of the directors nowhere states the fact that the reserves of the subsidiary companies stood in their books at nearly 3,000,000*l.*, and was therefore misleading. The report suggested that as the company had undertaken to provide obsolescence and depreciation reserves for its subsidiaries, those companies had made no such provision. In fact the reserves were much larger than was revealed to the shareholders by the report. The directors in considering the ratio of exchange, four to one, from deferred to ordinary shares must have examined the earnings of the company very carefully. But the report refers to the dividends, and only mentions the earning position casually. In effect the hidden reserves of the company were suppressed and concealed from the minds of the shareholders.

The evidence shows that there has been no loss of capital whatever, and any reduction of capital at the expense of a single class of shareholders is unjustifiable. The only real object in writing down the capital by 5,500,000*l.* is to make the rate of exchange of deferred for ordinary shares four to one instead of two to one; that is two deferred shares of 10*s.* to be exchanged for one ordinary share of 1*l.*

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(1) [1934] Ch. 635, 670.

The circular was not sufficiently informing to enable the shareholders to form an accurate opinion on the proposals.

Gavin Simonds K.C. in reply. The principle to be applied is substantially the same as in the case of a scheme of arrangement. The company has observed all the requirements of the statute and the memorandum and articles. The evidence shows that the classes were fairly represented at the meetings, and that the majority was in each case acting bona fide and not coercing the minority. Further, the scheme is clearly such as a business man would reasonably approve: see Buckley on Companies, 11th ed., at p. 320. It is essential to get rid of a capital structure under which, whatever dividend was paid to the deferred shareholders, twice that dividend would have to be paid to the ordinary shareholders. That is an embarrassing and prejudicial provision.

On the whole of the evidence this is a perfectly fair scheme as between the ordinary and the deferred shareholders. This is shown by the market values of the two classes of shares over the years 1931 to 1934. In 1934 the average ratio was 391 to 100, or nearly four to one. The statistical record issued with the report of the directors for 1934 gave the most complete information as to the company's reserves. In 1929 they were over 17,000,000*l.*, and by 1934 had been reduced to 14,308,000*l.* No more has been written off the capital value of the assets than is absolutely necessary. There are, in fact, no hidden reserves built up of undistributed earnings of subsidiary companies; practically the whole of the profits of these companies have been distributed to the parent company and have appeared in its balance sheet.

Not only is the scheme fair to all classes, but the circular was fair and adequate to convey all the necessary information to shareholders.

There is no principle requiring directors in putting forward a scheme of this nature to state exactly what their particular interests as shareholders are. The observations of Maugham J.

in *In re Dorman, Long & Co., Ld.* (1) were directed to something quite different—the separate interests of the banks financing the company. Such a disclosure has never been the practice, and non-disclosure is no ground for saying that the reduction ought not to be confirmed.

Under cl. 6 of the memorandum and arts. 71 and 72 of the articles of association separate meetings of the two classes of ordinary and deferred shareholders are required to be held. The company might have required that anybody not a member of the class at any meeting should leave the room, but it cannot be said it was not a separate class meeting, because some other shareholders not belonging to that class were present. There could be no vote by any member except in respect of a share of his own class.

EVE J. I propose without further delay to state at once the conclusion to which I have arrived, and leave to some later period the delivery of the judgment. It remains, therefore, for me to say this, that I am satisfied it is the duty of the Court in this case to confirm the resolution which has been passed, and I so do and I approve of the minute which has been proposed. There will be no order as to costs; the company will pay its own.

1935. Dec. 20. EVE J. This petition was presented with the object of obtaining confirmation by the court of a reduction of the petitioning company's capital from 95,000,000*l.* to 89,565,859*l.* proposed to be effected by a special resolution passed at an extraordinary general meeting of the company held on May 1, 1935. At that date the authorized capital of 95,000,000*l.* was divided into 22,727,000 7 per cent. cumulative preference shares of 1*l.* each, 43,767,355 ordinary shares of 1*l.* each, 21,745,290 deferred shares of 10*s.* each, 15,133,000 unclassified shares of 1*l.* each, and 5,000,000 unclassified shares of 10*s.* each. Of these shares the whole of the preference and the ordinary shares and 21,736,564 of the deferred shares of 10*s.* each had been issued and were fully paid up at the date of the passing of the resolution for reduction. None of the remaining shares have been issued. No part of the large reduction, amounting to 5,434,141*l.*, is required for the purpose of replacing capital which has been lost or is unrepresented by available assets. Nor does it involve the payment to any shareholder of any paid up capital of the company. The reduction is to be effected by cancelling paid up capital to the extent of 5*s.* per share on each of the 21,736,564 deferred shares which have been issued and are fully paid up and by reducing the nominal amount of each of such deferred shares from 10*s.* to 5*s.*

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(1) [1934] Ch. 635, 670.

The amount representing the reduction is to be carried to a special capital reserve available for the purposes which its designation indicates, and subject to an undertaking by the company that no part of it shall be distributed as a dividend. And if this were all that this petition involved the application would not, except perhaps as regards the magnitude of the sums involved, be dissimilar from many others which the Court has from time to time been called upon to consider. No want of good faith, no coercion or over-reaching on the part of the company or its directors or other agents has been suggested, and at each of the meetings the proceedings were so conducted as to satisfy those present. No one has attacked the scheme as being one to which no reasonable man could be expected to give his support. But the proposed reduction is an integral part of a scheme for the simplification of the company's capital account by re-adjusting the respective rights of the holders of the ordinary and deferred shares, and for amalgamating these two shares into one class; and from the very inception of this idea it was appreciated—indeed one cannot conceive how it would be otherwise—that in order to bring about the amalgamation the terms must be of a nature acceptable to both amalgamating classes. It appears from an exhaustive memorandum dated January 25, 1933, prepared by Dr. Coates for the information of his colleagues on the board, and marked "Strictly private and confidential," a copy of which was however supplied to the respondents for the use of their

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counsel and accountancy experts, that in his view the market value of the deferred shares had been excessive, and that at that time the exchange of the deferred shares for ordinary shares in the ratio of four to one would be excessively beneficial to the deferred shareholders. Upon this report the board decided to leave the matter over for a year or so. It was taken up again in the early part of this year, and under date March 27, 1935, there are entries in the minute book from which it appears that the scheme for the amalgamation of the ordinary and deferred shares was ready for submission to extraordinary general meetings of the company and to class meetings of the ordinary and deferred shareholders, that under the scheme the deferred shares would cease as from the close of the year 1934 to exist as a distinct class, and that each four deferred shares of 10*s.* would be converted and consolidated into one ordinary share, and that (I am reading the minute as it stands): "The board after discussion and full consideration of all the circumstances are unanimously of opinion that the scheme is fair and equitable as between the ordinary and deferred shareholders, and is in the interests of the company as a whole, and they accordingly approve the submission of the scheme to the shareholders."

No exception was taken to the amount of the reduction, nor was it ever seriously argued that the burden of the proposed reduction was not rightfully imposed on the shares standing last on the rota for dividend distribution. As will be appreciated, very shortly the substantial question on which the shareholders were divided was, how many deferred shares were to be given in exchange for one ordinary share. On April 6 last, as instructed at the board meeting with which I have just dealt, the secretary posted to each shareholder the appropriate notice of the meeting or meetings to which he was summoned (these are exhibits R.F.P. 1, 2 and 3), and therewith a form of proxy, admission and voting cards (exhibits R.F.P. 6, 8 and 9), a print of the company's report for the year 1934 (exhibit R.F.P. 5), and a circular signed by the secretary of the company (exhibit R.F.P. 4), in which an attempt, and in my opinion a successful attempt, was made to explain to the recipients the nature and effect of the proposals on which they were being invited to use their votes. I cannot recall any criticism directed to any ambiguity to be found in this circular. It has been freely criticized, and amongst other complaints made was one to the effect that the phraseology is in places complicated. The same might be said of the scheme itself, but in my opinion the circular is so composed as to convey to the recipients not only all the information necessary to enable them to realize what the proposals of the board were, but also the grounds upon which the policy underlying the proposals was based. No one has come forward to say that he did not understand the circular or was misled thereby. But be this as it may its publication provoked a protest from sundry holders of the deferred shares who were dissatisfied with the basis on which the deferred shares were to be converted into ordinary shares, and when on May 1 the meetings were held it became abundantly clear that the only opposition to the scheme came from the holders of deferred shares who complained of the terms on which their shares were to be converted into ordinary shares, and argued that the conversion should be in the ratio of two deferred shares for each ordinary share and not in the ratio of four deferred shares for each ordinary share.

At the meetings of the company and of the two separate classes the votes polled were as follows—The company: For the resolutions, 22,803,402 or 91·44 per cent. in favour; against, 2,135,971 or 8·56 per cent. against. At this meeting 45·28 per cent. of all the votes which could be polled were polled. The ordinary shareholders: 18,663,383 or 94·26 per cent. in favour, against, 1,136,163 or 5·74 per cent. against. The deferred shareholders: 3,722,414 or 77·26 per cent. in favour; against, 1,095,681 or 22·74 per cent. against.

The petition for the confirmation by the Court of the resolution for the reduction of the capital, No. 1 in paragraph 17 of the petition, was presented on May 2, the day after that on which the meeting was held. And the interval between the presentation of the petition and the hearing—which unfortunately included the long vacation—was utilized for an interchange of circulars and the formation of a committee of deferred shareholders. This committee having failed to induce the company to modify or alter the terms of the scheme as proposed in the circular of April 6, and as passed by the company and both classes of shareholders on May 1, was represented by its chairman, Mr. Carruth, at the hearing, whereat he claimed that he had been entrusted with a mandate by about 9000 shareholders holding about three million deferred shares, but this claim has not been supported by evidence to which the court can pay any attention, and I must deal with the matter in the regular manner by assuming that the company and its shareholders have expressed their wishes at the meetings properly called to give them the opportunity of so doing ; and that in the absence of evidence to the contrary the court is entitled to conclude that the company and its shareholders will act upon the lines contemplated by the resolutions passed unless it can be shown that the majority resolutions have been obtained by misrepresentation, concealment, chicanery or deceit. No such case has been advanced at the hearing, indeed it was from the first disclaimed, and in those circumstances I really have no jurisdiction to refuse the company the order it asks for. In this connection it must not be overlooked that the only substantial point in dispute has throughout been the relative values of the ordinary and deferred shares (a point upon which opinions may well differ), but one which is far more likely to be satisfactorily solved by the shareholders than by the court. The shareholders—including the deferred shareholders—have by very substantial majorities decided that the bargain is acceptable, and in the face of such majorities it is quite impossible for me to say it ought not to be accepted.

The opinion of these deferred shareholders who supported the view that the exchange ought to be on the more liberal basis of two to one was founded to a large extent on the assertion that the company had been gradually accumulating large reserves of undisclosed and undistributed profits, and that the day was fast approaching when these accumulations would be disclosed and distributed and the deferred shareholders be thereby compensated for their patient acceptance of meagre dividends in the past. In support of these contentions they relied primarily on the circumstances in which the deferred shares were originally issued, and insisted that these clearly indicated that the holders were to regard them as an investment from which the investor must hope for a satisfactory return out of increased profits in the distant future rather than in the immediate present. In conceding that this was a not unreasonable construction to put on the original issue the board has explained that the intermediate experience between the date of the issue of these shares and the present time has satisfied the directors that the anticipated increase in the company's profit to justify the continued retention of this class of shares has not materialized, and will not within a reasonable time do so ; and in the meantime the company will be at a great disadvantage by retaining a class of share which is regarded by those persons most competent to express an opinion on such a topic as very detrimental to what they speak of as the company's capital structure. Their evidence on this aspect of the case stands uncontradicted. Again, the evidence filed on the petition disposes absolutely of the suggestion that there exist undisclosed reserve funds or hidden undistributed profits. The allegations and arguments based on these suggestions are abundantly answered by the documentary and other evidence which has been produced and given at the hearing.

I do not pause to deal further with these matters, because in my opinion as soon as the court is satisfied that the resolution has been accepted by the company and by those who are affected by it and there is no suggestion of any misrepresentation or misconduct on the part of the company, the petitioners are entitled to the order.

I ought to add that I do not accept the view that it was incumbent on the directors to disclose in the circular of April 6 their respective holdings of ordinary and deferred shares, and I cannot bring myself to hold that the remarkable

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skill with which the series of meetings of May 1 were organized effected nothing because of the phrase, "or to attend thereat" in article 72 of the company's articles of association.

It is not suggested that anybody voted in the wrong class, indeed I think the contrary is proved; and it is impossible in these circumstances to hold that the bodily presence in the room where the meetings were held of persons who belonged to other classes invalidated the meeting. I have already expressed my conclusion sanctioning the scheme and confirming the reduction.

H. L. L.

C. A.

Certain of the deferred shareholders appealed. The appeal was heard on March 9, 10, 11 and 12, 1936; and judgment was delivered on April 1, 1936.

H. J. Wallington K.C. and *B. B. Stenham* for the appellants, the holders of the deferred shares. The effect of the directors' scheme would be—if it goes through—that the deferred shareholders (the appellants) would lose half their capital. Further they would lose their special voting rights, that is, the right to be consulted as a separate class when any changes are proposed which required their sanction; and in addition they would lose one-half of their ordinary voting rights. It is submitted that two very important points arise for decision on this appeal, first, whether art. 44 of the company's articles of association is wide enough to confer a right to reduce the capital—that, of course, is vital to the whole scheme; and another question will be whether the separate class meetings were properly held—that, of course, is vital to the jurisdiction of the Court to confirm the scheme. With regard to the latter, the fact is that, instead of having separate meetings, all the shareholders were there together, there was really only one meeting for the three purposes. Only one speech was made for the three meetings, there was no change in the physical situation at all.

Another matter for consideration is whether or not the directors' circular was in the circumstances adequate; that is, whether it disclosed all the material facts which the shareholders ought to know in order that they might be in a position properly to determine whether they would vote for or against the scheme.

The final question will be whether the whole scheme is one which the Court ought to approve—in other words whether the learned judge applied the proper tests to the scheme in order to see whether, as Maugham J. pointed out in *In re Dorman, Long & Co., Ld.* (1), the scheme was one of which an intelligent and honest shareholder might reasonably approve. It will be submitted that it was not such a scheme. It should be stated, however, that there is not and there never has been any want of good faith on the part of the directors. Further no complaint is made as to the policy of the directors with regard to the company's reserves, nor, indeed, with regard to any other matter in relation to the business of the company.

If the order of the learned judge remains, a precedent will be established whereby a company, when its directors, in order as an essential part of their scheme desire to simplify the capital structure of the company as a mere matter of convenience, will be able for that purpose only to take out of the pockets of one set of shareholders a very large sum of money and use it for the benefit of the other shareholders. The appellants feel that this should not be so. The various questions which the appellants consider may be involved in this appeal are to a certain extent considered by Maugham J. in *In re Dorman, Long & Co., Ld.* (1) when he deals with the essential contents of explanatory circulars. See also *Poole* v. *National Bank of China* (2) for the question of making good capital losses out of revenue. [The circular dated April 6, 1935, sent out to the shareholders by the directors with the notices was then read.]

The meetings were held under arts. 71 and 72 of the company's articles of association.

As to the first point whether the company's articles of

(1) [1934] Ch. 635, 657, 658. (2) [1907] A. C. 229, 240.

association give them the right to reduce the capital under circumstances such as these, the ordinary power of reduction is contained in s. 55 of the Act of 1929 and it requires confirmation by the court. Here the power is found in art. 44, which provides that the company may by special resolution reduce its capital by paying off capital, cancelling capital which has been lost or is unrepresented by available assets, reducing the liability on the shares, or otherwise, as may seem expedient. The words "or otherwise," it is submitted, do not add anything to what has gone before—namely, the specific instances when capital may be reduced. They should be limited to matters ejusdem generis. The genus would be the idea of getting rid of a liability of the company to shareholders in respect of share capital.

On the question of the limitation of general words and their restriction to the same genus as the specific words that precede them, see *Thames & Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (1) for Lord Halsbury L.C.'s remarks in his judgment. These words "or otherwise" or similar words and the ejusdem generis principle were considered in several cases: see for example, *Tillmanns & Co.* v. *s.s. Knutsford Ld.* (2), where the words were "or any other cause," and see Vaughan Williams L.J.'s judgment (3), and Farwell L.J. (4). The words "or otherwise" were considered in *Attorney-General* v. *Seccombe* (5) see Hamilton J.'s judgment. The rule seems to be this, that if you have particular words used followed by general words, you must try to ascertain what is the intention of the document itself. If it is necessary, for the purpose of ascertaining that intention, to put into operation the ejusdem generis rule, you operate it. But whether you operate it or not depends on this: is there some dominant characteristic or feature about the particular words which indicates that the general words are intended to go no further, or from which or by reason of the presence of which you are entitled to say that the general words go no further? If you find that is the position, then

(1) (1887) 12 App. Cas. 484, 489, 491.

(2) [1908] 2 K. B. 385, 395, 404, 405.

(3) [1908] 2 K. B. 395, 396.

(4) Ibid. 404, 405.

(5) [1911] 2 K. B. 688, 702, 703.

you have to construe the document without giving other than the ejusdem generis effect to the general words. It is submitted therefore that these words "or otherwise" would extend the power of the company to reduce its capital in such circumstances and for purposes other than those specified in the articles; and that to do so would have such an effect upon the deferred shareholders that it is not right to say that any such intention is to be found within this art. 44.

As regards the question of the meetings, clause 6 of the company's memorandum of association, which requires the sanction of a separate meeting of the holders of shares of each class, should be first considered. The word "separate" is the word which is of supreme importance, and by art. 72 it is provided that at a class meeting nobody but holders of the shares of the class shall attend except a director. Though the accidental presence of holders of other classes of shares would not invalidate the meeting, the real intention of this article is to prevent holders of other classes from attending and taking part in the meetings of a particular class of shareholders. This provision is made to meet any mistake likely to arise in the case of a large number of shareholders. In the case of this company separate voting cards were sent out to the shareholders so that they could indicate whether they were holders of one or both classes of shares. That would indicate that this class meeting was intended by the articles to be a separate class meeting in the sense that it should be attended by substantially only the holders of the shares of that class.

The word "separate" must have its ordinary meaning given to it. The particular class of shareholders must have an opportunity of considering and discussing their own rights from their own point of view without embarrassment. See, for instance, *Sovereign Life Assurance Co.* v. *Dodd* (1), where the reasons are given by Lord Esher, and also compare Kay L.J.'s remarks. In this particular case now before the Court the only attempt to distinguish between the two classes —ordinary and deferred—with regard to the meetings is by

(1) [1892] 2 Q. B. 573, 579, 586.

having separate voting cards. This is not the most important part of what the articles prescribe. If the submission made by the appellants about these meetings is good—namely, that there was no real separate meeting of the deferred shareholders, then there was no jurisdiction to entertain consideration of this matter at all, because the particular machinery laid down has not been complied with and the scheme could not therefore be confirmed.

On the question of the circular sent out by the directors, it is submitted that the evidence shows that the reason for the scheme is one of mere convenience and nothing else. Whether or not the scheme is outside the scope of art. 44, it is wrong merely as a matter of convenience to reduce the shareholders' capital in this way. The circular unfortunately emphasizes dividends but does not mention the shareholders' interest in the reserves. All matters should have been set out for the guidance of the shareholders other than dividends and winding-up rights. The directors left out the fact that the sure guide is the earnings of the company and also they left out the question of the deferred shareholders' interests, a very large sum, in the reserve capital. They should not have emphasized dividends and winding-up rights. They should have set out everything that was material and which might substantially affect the mind of a shareholder. This they did not do.

Further, on the omission from the circular of any mention of the directors' holdings of ordinary shares, a passage from Maugham J.'s judgment in *In re Dorman, Long & Co.* (1) may not be unimportant. The directors should have disclosed the fact that they had an interest as ordinary shareholders; no breach of duty is of course alleged, but if the disclosure had been made, the information might have been valuable to the deferred shareholders. The shareholders have been invited to make up their minds on insufficient information and the scheme should not be confirmed by the Court.

Lastly, is this scheme one which the Court ought to approve? On this point see *British & American Trustee & Finance*

(1) [1934] Ch. 635, 670, 671.

Corporation, Ld. v. *Couper* (1) for Lord Macnaghten's remarks; *Poole* v. *National Bank of China* (2), especially Lord Macnaghten's judgment. This establishes the proposition that the Court must look at the scheme in all its bearings and ascertain whether it is unfair or inequitable to any particular class of shareholders. See, again, also *In re Dorman, Long & Co.* (3), especially paragraph 4 of the headnote, and Maugham J.'s judgment on pp. 655 to 657; and his remarks regarding the explanatory circular on pp. 665, 666, and again on p. 670, and see as to his reasons for not confirming the scheme, p. 673. It is submitted that this scheme is not a fair scheme.

On the question of separate meetings, having regard to clause 6 of the memorandum of association of this company, which controls the articles, the Court is invited to decide finally what is the meaning of a "separate meeting." If the articles prescribe that there should be a separate meeting, it cannot be right not to hold a separate meeting and that depends on what is meant by "separate."

[LORD WRIGHT M.R. Is it any the less separate because the other class of shareholders is present in the room?]

It is submitted—yes.

[LORD WRIGHT M.R. I should have thought that people who were present at the meeting were not those physically present but those qualified to be present. It seems to be a question of what is meant by "attending," or "at a separate meeting."]

One must consider the object of the meeting—that is, for the persons concerned to discuss the particular matter without the presence or speeches of others. Here, it is submitted, the evidence shows somebody did object, although not very strongly.

[LORD WRIGHT M.R. An objection must mean a serious objection on the part of a considerable body of those present.]

Here, on the evidence, this meeting was one continuous assembly from beginning to end without any attempt to separate the classes of shareholders. It is impossible to say it was a separate meeting, because to be such it has to be both "separate" and a "meeting," that is a meeting for separate discussion. It is one for the purpose of preventing any interference with the existing rights of the separate class of shareholders without their consent, the intention being that the class shall really meet for the purpose of considering their own interests separately from any other class having different interests. Where you have, if not in express words, at least by implication, an invitation that members of another class shall be present and remain present during the so-called proceedings of a separate class meeting, it cannot in reality be a separate class meeting.

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(1) [1894] A. C. 399, 411, 414, 415.

(2) [1907] A. C. 229, 236, 237, 238, 239, 240.

(3) [1934] Ch. 635, 655–657, 665, 666, 670, 673.

Gavin T. Simonds K.C., *Lionel L. Cohen K.C.* and *Cecil W. Turner* for the respondents were not called upon.

Cur. adv. vult.

1936. April 1. LORD WRIGHT M.R. The judgment which Clauson J. is about to read is the judgment of the Court. (1)

CLAUSON J. This is an appeal from an order of Eve J. of November 13, 1935, confirming the reduction of capital resolved upon by the company on May 1, 1935. The petition for confirmation was opposed before Eve J. by certain deferred shareholders of the company, and the present appellants are holders of deferred shares.

Before the reduction now in question the issued capital of the company, all of which was fully paid up, consisted in round figures of 23,000,000*l.* of 7 per cent. cumulative preference share capital, 43,000,000*l.* of ordinary share capital, and 11,000,000*l.* of deferred share capital. The preference share capital is not affected by the proposed reduction, and it will not be necessary to refer to it again.

The dividend right of every holder of ordinary share capital was to receive an annual non-cumulative dividend of seven per cent., and the balance of profits remaining available for distribution in respect of each year were divisible as to two-thirds among the holders of ordinary share capital and as to one-third among the holders of deferred share capital. In case of winding-up the holders of ordinary share capital were entitled to repayment of their paid-up capital in priority to the deferred share capital, after which the paid up amount of the deferred share capital was to be repaid and any surplus assets were to be distributed as to two-thirds among the holders of ordinary share capital and as to one-third among the holders of deferred share capital.

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(1) Lord Wright M.R., Romer L.J. and Clauson J.

The respective voting rights were as follows: Every 10*l*. of preference share capital carried one vote, and every 1*l*. of ordinary share capital or of deferred share capital carried one vote. The deferred shares were 10*s*. shares, while all the other shares were 1*l*. shares. But this circumstance does not affect the substantial accuracy of the preceding statement, which has been made in terms of capital and not of shares.

The proposed re-organization of the company's capital, in which the reduction figures as the last step, involves conversion of every 2*l*. of deferred share capital into 1*l*. of ordinary share capital, the company's capital (apart from the preference shares) being thus unified into one class of ordinary share capital. It is obvious that this operation involves the disappearance of one half of the paid-up deferred share capital, namely, in round figures, five and a half million pounds, and it is the reduction of the company's capital by this figure which was submitted for confirmation to Eve J.

In view of the capital structure of the company it is obvious that prior to the reduction there was a conflict of interest between the ordinary share capital and the deferred share capital in regard to the amount to be divided by way of dividend. The directors necessarily found themselves in the unfortunate position that their decision on any dividend distribution—and accordingly their decision on any question of carrying revenue to reserve—affected the relative proportions in which the two classes of shareholders shared in the company's profits. The practical difficulties which such a

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situation occasions—where the company is, as this company is, one of vast extent with shares very freely dealt in—are obvious, and such difficulties cannot but enure to the disadvantage of the company as a whole. That under such circumstances a very large majority of the company should desire to put an end to these difficulties by unifying the two classes of shares is not at all astonishing. That the terms on which the deferred share capital was to be converted into ordinary share capital for the purpose of unification became a matter of the keenest controversy is still less astonishing. After very careful consideration the board proposed the terms of conversion indicated above; and those terms of conversion have, after the most ample discussion, been accepted as satisfactory by upwards of three-fourths in value of such holders of the two classes of shares concerned as thought proper to vote in person or by proxy upon the subject.

The duty of the Court, in considering whether or not to confirm the proposed reduction, is now well settled. Its first duty is to be satisfied that the necessary meetings have been properly held and the necessary majorities obtained. It is further the duty of the Court to consider whether the reduction operates unfairly as regards one or the other of the classes of shareholders; and thus the Court has to consider, in such a case as the present, the operation of the whole scheme of re-organization of capital in which reduction is the final step. There is further no doubt that if the Court were satisfied that any class of shareholders concerned voted under some serious misapprehension as to the material facts and thus came to a conclusion to which it is reasonable to suppose that they would not have come but for the misapprehension, the Court would refuse to confirm the reduction without giving some further opportunity for the fresh consideration of the matter. On the petition coming before Eve J., the matter was thoroughly probed, the cross-examination of witnesses and the speeches of counsel extending over several days; and after very full consideration Eve J. came to the conclusion that a number of minor objections, based mainly on procedure, failed, and that there was no ground for overriding the decision come to by the company as a whole and by the proper majorities of each of the two classes of shareholders concerned, to the effect that the terms of the conversion and reduction were proper to be adopted.

Before this Court objection was taken to the order of the learned judge on four grounds: First it was said that on the true construction of art. 44 of the company's articles of association the company had not taken power to reduce its capital by cancelling, in the manner proposed, the five and a half million of deferred share capital. This objection, if correct, would establish that the Court had no jurisdiction to deal with the petition. It was argued that on the true construction of that article the company had taken power to reduce its capital only by paying off capital, cancelling capital lost or unrepresented by available assets, or reducing the liability on the shares, it being suggested that the words "or otherwise as may seem expedient" could not fairly be construed to mean that the company was taking power to reduce its capital in any other way than the three ways specifically mentioned. In our opinion the narrow construction which was sought by the appellants to be placed on this article is not correct; we are satisfied that, on the plain meaning of the words used, the company took power by the article to reduce its capital in any way in which it was under the statutes authorized so to do.

The second objection taken was based upon arts. 71 and 72 of the company's articles of association. There is no question but that the alteration in the rights of the two classes of shareholders requires, under those two articles, the assent of the shareholders of each class by an extraordinary resolution, passed at a meeting of such class. Such a meeting is referred to in clause 6 of the company's memorandum of association as a separate meeting of the holders of shares of the class.

It was suggested on behalf of the appellants that no separate meeting of the holders of the deferred share capital was held, and that, in so far as the reduction of capital would affect their separate rights, it must be treated as invalid. The facts are as follows. A notice, dated April 6, 1935, was sent to all the shareholders that the ordinary general meeting of the company would be held at the Central Hall, Westminster, on May 1, 1935, at 10.30 A.M., for the purpose of transacting the ordinary business of the company and, as special business, passing a resolution for the conversion of the company's share capital, as it would stand if the proposed re-organization took effect, into stock. By the same document notice was given of an extraordinary meeting of the company to be held on the same date and at the same place, at 10.45 A.M., or so soon thereafter as the business of the ordinary general meeting should be concluded, for the purpose of passing, first, a resolution for reducing the capital of the company by one half of the capital paid up on the deferred shares (this being the actual resolution, confirmation of which by the court is required for its validity), and further for passing a resolution converting the paid up deferred share capital into ordinary capital of half the amount. There are subsidiary resolutions and alterations of the articles of a somewhat intricate character, the details of which are not material for any purpose with which this Court is concerned. With the notice convening the ordinary general meeting, to be followed by the extraordinary general meeting, the holders of ordinary shares received a notice of a separate meeting of the holders of the ordinary shares, to be held on the same date and at the same place at 11 A.M., or so soon thereafter as the extraordinary general meeting should be concluded, for the purpose of considering an extraordinary resolution, in effect approving the proposed re-organization of the capital rights on behalf of the ordinary shareholders. Each holder of deferred share capital received a notice convening a separate meeting of the holders of deferred shares to be held on the same date and at the same place at 11.15 A.M., or so soon thereafter as the meeting of ordinary shareholders should be concluded, for the purpose of passing a corresponding resolution approving the proposed re-organization of the capital rights on behalf of the deferred shareholders.

On May 1, 1935, the business of the ordinary general meeting was opened at or about half-past ten, and the meeting having

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concluded, and, as it would appear, the hour of 10.45 for which the extraordinary meeting was convened having passed, the extraordinary general meeting of the company began, and in the course of this meeting speeches were made by members of the board and others in support of the proposed scheme for unification of capital, and speeches were made by shareholders of various classes against the proposed scheme. At long last the resolutions of which notice had been given were put to the meeting and lost on a show of hands and a poll was demanded by the chairman, and the members were directed to fill up the blue portions of their voting cards. The extraordinary meeting was thereupon adjourned until 5.30 for the declaration of the poll. No question is raised but that all the resolutions passed at that meeting were, having regard to the result of the poll, effectively passed. The extraordinary general meeting having been thus adjourned, the chairman opened the meeting of ordinary shareholders by stating that, as he had covered the business of this meeting by a speech at the ordinary general meeting, he did not propose to make another speech, and he moved the resolution of which notice had been given which resolution was seconded. The chairman before putting the resolution pointed out that only shareholders with a pink portion on their voting cards could vote, that is, those who held ordinary shares. No attempt was made to clear the room of shareholders not holding ordinary shares, and admittedly a number of shareholders who did not hold ordinary shares remained while this meeting was held. The resolution was put to the meeting. It was declared carried by the necessary majority on a show of hands, but notwithstanding that fact a poll was demanded. It was not suggested that either on this show of hands or on the poll any but holders of ordinary shares voted. The meeting was then adjourned until 5.30 for the declaration of the poll. The chairman then opened the meeting of holders of deferred shares, again without a further speech, and moved the resolution of which notice had been given and that resolution was seconded. A shareholder moved a direct negative which the chairman in our view quite properly appears to have

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disregarded. The chairman then put the resolution after pointing out that only shareholders with a green portion on their voting cards could vote, that is those who held deferred shares. On a show of hands the resolution was not carried and a poll was demanded, and the meeting was adjourned until 5.30 for the declaration of the poll. In the case of this meeting as in the case of the meeting of ordinary shareholders no attempt was made to clear the room of shareholders not holding the class of share in respect of which the meeting was convened, and admittedly a number of shareholders who did not hold deferred shares remained while this meeting was held. But as in the former case it was not suggested that either on the show of hands or on the poll any but holders of deferred shares voted. It was said at a late stage of the proceedings before Eve J. that at the meeting of deferred shareholders a shareholder or shareholders got up to speak or to make some motion but did not get a hearing. It seems that the chairman was quite unconscious of any shareholders taking any such action, and it appears with reasonable clearness that if in fact any such move by any such shareholders was made, it was made with so little insistence that it cannot be treated as affecting in any degree the regularity of the chairman proceeding to put the resolution to the vote.

These being the circumstances, it is now suggested on behalf of the appellants that no valid separate meeting of holders of deferred shares was held. They point out that under art. 72 no member of the company—not being a director—is to be entitled to notice of or to attend at a class meeting unless he be a holder of the shares of the class intended to be affected by the resolution, and that no vote is to be given except in respect of a share of that class. It is not suggested that any of the votes returned as given at the separate meetings were given otherwise than by persons properly entitled to vote, but it is argued that a class meeting cannot be treated as a separate meeting of the class if at the meeting there are in fact present persons not belonging to the class. In our opinion there is no foundation for this suggestion. The convenience of dealing with the matter of meetings as it was dealt with in this case is obvious, and indeed, having regard to the very large number of shareholders, it is not easy to see how (without grave inconvenience) the meetings could otherwise be held. We cannot see why a meeting should not be a perfectly good meeting of a class and a good separate meeting of the class, if the class in fact meets together, merely because some strangers, to whose presence nobody in fact objects, are within the same four walls. It was suggested that the method of holding these meetings prevented the members of a class from taking counsel with one another: but in fact the extraordinary general meeting was utilized by all the members of the various classes to take counsel together; and that this was recognized as a convenient and proper thing is obvious from the circumstance that no objection was taken at the meetings to the course in fact adopted. The matter having been thoroughly canvassed at the extraordinary general meeting it was recognized by every one that no further discussion was necessary.

In our judgment the appellants' second objection fails.

The first two objections taken to the learned judge's order being in our judgment groundless, it remains for us to deal with the appellants' two remaining objections, which were formulated by counsel as follows: The third objection was that the circular issued by the directors with the notice of the meeting was inadequate. The fourth objection was that the scheme was one which the Court ought not to approve. These two objections appear to have been formulated (whether or not in precisely the same terms we need not pause to consider) before the learned judge. The learned judge pointed out that no want of good faith or coercion or over-reaching on the part of the company or its directors or other agents, and no misrepresentation, concealment, chicanery or deceit was suggested, and in this Court counsel was careful to make it clear that that was in fact the case. As regards the directors' circular the learned judge, after hearing all that could be said against it by the witnesses and counsel for the deferred shareholders, held that it was a successful attempt to explain to the recipients the nature and effect of the proposals upon

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which they were invited to use their votes. His Lordship added: " I cannot recall any criticism directed to any ambiguity to be found in this circular. It has been freely criticized, and amongst other complaints made was one to the effect that the phraseology is in places complicated. The same might be said of the scheme itself, but in my opinion the circular is so composed as to convey to the recipient not only all the information necessary to enable him to realize what the proposals of the board were, but also the grounds upon which the policy underlying the proposals was based. No one has come forward to say that he did not understand the circular or was misled thereby." The learned judge points out that no one had attacked the scheme as being one to which no reasonable man could be expected to give his support; and that the only substantial point in dispute had throughout been the relative values of the ordinary and deferred shares, a point upon which opinions might well differ, but one which in his view was far more likely to be satisfactorily solved by the shareholders than by the Court. His Lordship summed the matter up by saying that the shareholders, including the deferred shareholders, had by very substantial majorities decided that the bargain was acceptable, and in the face of such majorities it was quite impossible for him to say it ought not to be accepted.

In this Court counsel explicitly stated that it was not questioned that in settling the terms of the circular the directors had acted to the best of their ability in attempting fully to explain the whole position, but the circular was criticized as being inadequate on the following grounds: First, it was said that attention was not drawn to the fact that the subsidiary companies have, in their balance sheets, obsolescence reserve funds which are said to amount to about 3,000,000*l*. Secondly, that attention was not drawn to the fact that there was some 6,000,000*l*. of capital invested in what was spoken of as the " Billingham undertaking," which was likely to become revenue-producing in the near future. Thirdly, it was complained that the circular did not state the holding of the directors in the various classes of share capital. As regards the first point, the facts are that the company, which is in substance a holding company with a large number of subsidiaries, has in recent years adopted the policy of setting up an obsolescence reserve in the company's own balance sheet to provide for obsolescence accruing in the assets of the subsidiary companies, but that there still stand in the balance sheets of the subsidiaries, obsolescence funds dating back in substance to a period before this policy was adopted; so that in addition to the company's obsolescence reserve of some 14,000,000*l.* there exist these further obsolescence reserves of about 3,000,000*l.* It was suggested, and no doubt truly suggested, that in view of the capital structure of the company as it was before the reduction, the existence of this further 3,000,000*l.* of reserves which were not specifically alluded to in the directors' circular may have some bearing upon the relative values of the ordinary and deferred shares. On the second point the facts are that some six millions have been laid down in an undertaking which is believed to be on the point of becoming income producing, and that thus some capital (though of course not necessarily as much as six millions), which during a period of construction and development has produced comparatively little or possibly no revenue, will or may be earning revenue or greatly increased revenue in the near future. That again—in view of the relative dividend rights before reduction—is a circumstance which might tend somewhat to enhance the dividend prospects of the deferred shares and thus add to their attractiveness. The two matters in question are not specifically mentioned in the directors' circular, but it is not suggested that that arose from any desire on any one's part to conceal them or to discount them. In this case the matter for consideration is a comparison of two types of shares, first, a share which carries with it no revenue until the amount to be distributed in dividend passes a certain definite point, and when that point is passed carries by way of revenue a rapidly increasing proportion—relative to paid up capital—of the fund divided; and secondly, a share which carries revenue up to the definite point without

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competition from any other class, and from that point carries by way of revenue a rapidly diminishing proportion—relative to paid up capital—of the fund divided. The comparison is made in order to fix a rate at which the share of a more speculative character is to be exchanged for a share of less speculative character. Whether an individual holder of an ordinary or a deferred share approves the rate suggested will depend on the estimate which he forms of the relative prospects of the two classes of shares in view of the particular circumstances of the company's business. No line can logically be drawn which can exclude any such circumstance from consideration. But as Maugham J. pointed out in *In re Dorman, Long & Co.* (1), the very object of such a circular as that with which we have to deal would be defeated if it were extended so as to state all relevant facts. Where the matter is one of difficulty, the Court will always scrutinize such a circular very carefully; but where, as in this case, there is no suggestion that the directors were doing otherwise than honestly putting forward to the best of their skill and ability a fair picture of the company's position, the question is not whether the circular might not have been differently framed, but whether there is any reasonable ground for supposing that such imperfections as may be found in the circular have had, with or without other circumstances, the result that the majority (who have approved the proposal placed before them) have done so under some serious misapprehension of the position. In this particular case the suggestion that the imperfections of the circular, if they are properly so called, in regard to these two matters have led to any such result seems to us to be quite unreasonable. When one studies the circular in the light of such of the evidence as the appellants drew to our attention, the disproportion between the importance of the two matters in question and the importance of the other matters explained in the circular becomes very striking indeed.

The third point taken on the circular was that it did not state the holdings of the directors in the various classes of shares. We agree with the learned judge that no such disclosure was incumbent upon them. Given honest directors —and their complete honesty is unchallenged—it is not easy to see how this disclosure could assist a shareholder in forming an opinion on the matter which he had to consider. Reference was made to an unreported case of *Hughes* v. *Union Cold Storage Co.* before Eve J. on July 19, 1934, where it was held that a resolution was not binding on a minority where the circular issued by the directors recommending the reduction suppressed the fact that two of the directors had an overwhelming personal interest in the matter of such a character that their advice could hardly fail to be biased, and that ignorance of the existence of that interest would leave the shareholders in ignorance of a most material fact directly bearing upon the desirability of the resolution. That decision seems to us to have no bearing on the question of disclosing the directors' holdings of shares in such a case as the present.

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(1) [1934] Ch. 635.

We accordingly see no reason to differ from the conclusion to which the learned judge came that no reason for the refusal of confirmation to the reduction resolution could be properly based upon any criticism of the directors' circular.

The last objection made by counsel was that the scheme was one which the Court ought not to approve. It is to be gathered from the learned judge's judgment that in the court below the scheme was not attacked on the ground that it was one to which no reasonable man could be expected to give his support ; but we understood counsel in this Court to urge that the present scheme of re-organization of capital was not one which an intelligent and honest shareholder might reasonably approve. It has long been well settled that any power conferred on a majority to bind a minority, such as the proper majority of the two classes of shareholders are exercising in the present case, must be exercised bona fide for the benefit of those concerned—see Lindley M.R. in *Allen* v. *Gold Reefs of West Africa* (1) ; and it is also well settled that the Court ought not to approve of an arrangement sought to be imposed by a majority on a minority, "if the arrangement cannot reasonably be supposed by sensible business people to be for the benefit of that class as such," see Bowen L.J. in *In re Alabama, etc., Ry. Co.* (1), or unless it is "so far fair and reasonable, as that an intelligent and honest man, who is a member of that class, and acting alone in respect of his interest as such a member, might approve of it," see Fry L.J. in the same case. After careful consideration of the long and detailed analysis of the position placed before us by counsel, it appears to us that the question whether it is worth while for the respective classes of shareholders to accept the modification of their rights proposed to be effected by the re-organization of the capital is eminently the type of question in regard to which it is true to say, to adapt the language used by Lindley L.J. in *In re English, Scottish & Australian Chartered Bank* (2), that shareholders acting honestly are much better judges of what is to their commercial advantage than the Court can be. We are quite clear that no material has been placed before us to justify the suggestion that the decision to which the majorities of the respective classes have come, with the approval of the learned judge, is a decision which, having regard to well settled principles, we can overrule.

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(1) [1900] 1 Ch. 656, 671.

These are the reasons for which the appeal from the decision of Eve J. has been dismissed.

When the matter was before Eve J. the opponents of the reduction asked that, as a condition of the Court's sanction to the reduction, the company should be ordered to pay their costs. It is within the power of the Court to impose such a condition in a proper case, and the power has not infrequently been exercised where the Court has been satisfied that the light thrown on the matter by the opposition has been of assistance to the Court. In the present case the learned judge did not see fit to require the company to pay the opponents' costs. It was suggested that we might overrule the judge's decision on this point while affirming his order. It is not necessary to consider whether we have any jurisdiction

(1) [1891] 1 Ch. 213, 243, 247. (2) [1893] 3 Ch. 385, 409.

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to do so, since in the present case we can see no ground for interfering with his lordship's exercise of his discretion in the matter. The opposition to the reduction entailed a hearing which lasted seven days before the learned judge, much of the time being consumed in an elaborate cross-examination, directed in very great measure to the advisability of the proposed re-organization of capital, an issue for the shareholders rather than for the Court; and the company's costs incurred in meeting this opposition have fallen upon the shareholders as a whole. We are not surprised that the learned judge seems to have taken the view that little if any assistance was in this particular case rendered to the Court by an opposition which entailed a very heavy expense on the company.

As regards the costs of the present appeal we see no ground for departing from the usual course of visiting the costs on the unsuccessful appellant. The appellants' argument on the technical points, as to the construction of art. 44, and as to the regularity of the procedure at the class meetings, has failed. The rest of the appellants' arguments, having regard to their counsel's acceptance of the complete honesty of all concerned, could lead in substance to no useful result unless the Court were prepared to overrule on a matter of commercial expediency the decision of the proper majorities of shareholders of the classes concerned; and this is a case where it is part of the contractual terms, binding on the shareholders by reason of the contents of the articles of association, that the decision of the proper majority shall bind the minority. We accordingly dismiss the appeal with costs.

Solicitors: *Nordon & Co.; William Morris.*

A. R. T.

Distinguished. *Re* A DEBTOR (No. 335 OF 1947). [1948] 2 All E.R. 533.

Considered. THEOPHILE *v.* SOLICITOR-GENERAL. [1950] 1 All E.R. 405.

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In re DEBTORS.

[No. 836 of 1935.]

Bankruptcy—Jurisdiction—Foreigner resident abroad but trading in England—Act of Bankruptcy—"Debtor"—Deed of assignment executed abroad for benefit of creditors generally—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 1, *sub-s.* 1 (*a*), *sub-s.* 2.

A foreigner resident abroad but trading in England does not commit an act of bankruptcy within the meaning of the Bankruptcy Act, 1914, s. 1, sub-s. 1 (*a*), sub-s. 2, by executing abroad a deed of assignment of his property for the benefit of his creditors generally, and intended to operate according to the law of that foreigner's domicil.

Cooke v. *Charles A. Vogeler Co.* [1901] A. C. 102 and *Ex parte Crispin* (1873) L. R. 8 Ch. 374 applied.

APPEAL from an order of Mr. Registrar Mellor dismissing a bankruptcy petition.

The debtors (hereinafter referred to as "B. C." and "G. W.") were American citizens and carried on a financial business at a number of places under their firm name at Paris, Cannes, Nice, London, Geneva, Amsterdam, Shanghai and at two places in New York. For some time they had been living in Paris. Their branch business in London was managed by one "D.," an Englishman.

On July 17, 1935, "B. C." left Paris and went to America, where "G. W." was then residing, and their offices in Paris were then closed. Thereupon "D." wound up the affairs of the London branch and applied such assets as he had in settlement of the claims of the English creditors.

On August 5, 1935, "B. C." and "G. W." in the State of New York executed an assignment or conveyance of their property to trustees for the benefit of their creditors. There was no evidence that the assignment comprised the whole of "G. W.'s" property.

The petitioning creditor relied on the execution of the assignment of August 5, 1935, as constituting an act of bankruptcy by "B. C."

The Registrar dismissed the petition.

On January 17, 1936, the Registrar, in the course of a written judgment on a previous petition by a lady against the same debtors [No. 824 of 1935], had said with regard to the deed of assignment of August 5, 1935 (omitting the actual names and descriptions of the debtors): "The assignment relied on was a deed of assignment dated August 5, 1935, and made between 'B. C.' residing in the City of New York, individually, and 'B. C.' and 'G. W.' both residing in the City of New York co-partners . . . . and 'J. F. O.' of New York of the second part. By this deed 'B. C.' assigns all his individual, and both partners assign all their partnership, or joint property to 'J. F. O.' as trustee for the creditors of the partnership and of 'B. C.' individually. The deed contains no assignment by 'G. W.' of his separate or individual property. In order to obtain a receiving order against both 'B. C.' and 'G. W.' it must of course be established that each has committed an act of bankruptcy. Now it is clear that 'G. W.' by this deed assigns merely his interest in the partnership property. It is also clear that an assignment of property to a trustee for creditors in order to be an act of bankruptcy under s. 1, sub-s. 1 (*a*), must be an assignment of all or substantially all the debtor's property: see *In re Spackman. Ex parte Foley.* (1) This raises the question—is this deed an act of bankruptcy by 'G. W.' assuming that it is so as regards 'B. C.'? (a point with which I shall deal later). It appears from the evidence that 'G. W.' in or before 1923 became a limited partner with 'B. C.' in the firm . . . . to the extent of 10,000 francs, that 'G. W.' ceased all active connection with the business in 1930 and that he knows nothing whatever about the affairs of the partnership. There is no further evidence on either side as to whether or not 'G. W.' possesses substantial or any separate property. In these circumstances, I am asked by counsel for the petitioning creditor to infer that 'G. W.' has no separate, or no substantial separate property. This I decline to do. It is the duty of the petitioning creditor to establish affirmatively that 'G. W.' has committed the act of bankruptcy alleged, and she

(1) (1890) 24 Q. B. D. 728.

can only do so by proving that his interest as limited partner in the partnership assets comprises substantially all his property. As she has failed to establish this the petition must be dismissed against 'G. W.'

This, however, does not dispose of the case, because under s. 115 a receiving order can still be made against 'B. C.' assuming that he is 'a debtor' within the meaning of s. 1, sub-s. 2, and of s. 4, sub-s. 1 (*d*), and has committed an act of bankruptcy. Now on the point as to whether 'B. C.' is a 'debtor' I am clearly of opinion that the decision in *Cooke* v. *Charles A. Vogeler Co.* (1) in so far as it decided that the debtors in that case were not debtors within the meaning of the Bankruptcy Act is no longer applicable, having regard to the present words in s. 4, sub-s. 1 (*d*), 'has carried on business in England personally or by means of an agent or manager.' I think 'B. C.' is a 'debtor' subject to the English bankruptcy law. Then was the deed of assignment of August 5, 1935, being an assignment of all his property for the benefit of his creditors, an act of bankruptcy? This raises a very interesting and difficult question. 'B. C.' is a domiciled American, the deed of assignment was executed in New York in favour of an American trustee, and it is contended that in such circumstances it is not an act of bankruptcy unless it can be shown that it was intended to operate according to English law.

These facts are almost identical with the facts in *Cooke* v. *Charles A. Vogeler Co.* (1), and although, as already stated, I think that case is no longer law in so far as it decided that the debtors who executed the deed in that case are not 'debtors' I cannot disregard the opinions expressed by Lord Halsbury L.C. where, quoting with approval the judgment of Sir G. Mellish in *Ex parte Crispin* (2), he says this (3): 'The first [act of bankruptcy] is that a debtor has, in England or elsewhere, made a conveyance or assignment of his property to a trustee for the benefit of his creditors generally. This seems clearly intended to relate to a conveyance which is to operate according to English law, which a conveyance executed by a domiciled Englishman, although out of England may do; but a conveyance executed by a domiciled foreigner in his own country must necessarily operate according to the foreign law, and we think it was never intended that such a conveyance should be an act of bankruptcy.' It is true that the deed states that the partners carry on business in London amongst other places, but there is no evidence before me to show (although similar in form to an English deed of assignment) it was intended to operate according to English law. Although the views expressed by Sir G. Mellish and Lord Halsbury may be said to be 'obiter dicta' I think it is my duty to act in accordance with those views, and I accordingly decide that the deed of August 5 was not an act of bankruptcy."

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(1) [1901] A. C. 102.
(2) L. R. 8 Ch. 374.
(3) [1901] A. C. 102, 109.

In giving judgment on the present petition on January 30, 1936, the Registrar, referring to his previous judgment, said: "As to the first point, the deed of assignment, as I said in my written judgment, I think it is a difficult point with regard to the alteration of the wording of the Act as to who is a debtor, but for the reasons already given I think that the deed of assignment is not an act of bankruptcy by either partner. Admittedly, it is not a deed of assignment by 'G. W.' because there is no evidence as to whether he has or has not any separate property, in other words, whether that includes all his property. So I need say no more about the deed of assignment." The Registrar then dealt with the other alleged acts of bankruptcy which do not call for a report.

The petitioning creditor appealed. The appeal was heard on April 3, 1936.

The only question calling for a report was whether the execution by "B. C." in New York of the deed of assignment of August 5, 1935, constituted an act of bankruptcy by him.

Cyril Salmon for the appellant. One of the questions raised by this appeal is whether the dictum approved by the House of Lords in *Cooke* v. *Charles A. Vogeler Co.* (1) is, having regard to subsequent legislation, still effective.

(1) [1901] A. C. 102.

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As regards "G. W.," there being no evidence that the deed of assignment comprised the whole of his property, reliance cannot be placed on its execution by him as constituting an act of bankruptcy so far as he is concerned.

The case of "B. C." is different, however, because the deed did include the whole of his property and did therefore, it is submitted, constitute an act of bankruptcy by him within s. 1, sub-s. 1 (*a*) and sub-s. 2 (*c*), of the Bankruptcy Act, 1914, although the deed was executed in New York. Although a foreigner he came within the definition of a "debtor" in sub-s. 2 (*c*), and the execution of the deed in New York is covered by the word "elsewhere" in s. 1, sub-s. 1 (*a*), the use of which makes it immaterial where a deed is executed.

It is said, however, that the case is governed by the dictum of Mellish L.J. in *Ex parte Crispin* (1), which was cited with approval by Lord Halsbury in *Cooke* v. *Charles A. Vogeler Co.* (2) to the effect that the conveyance contemplated by the Bankruptcy Acts did not include a conveyance executed by a domiciled foreigner in his own country to operate according to the law of that country. That case, however, was decided under the Bankruptcy Act, 1883, which did not contain any definition of "debtor." Sect. 1, sub-s. 2, of the Act of 1914 now provides that "The expression 'a debtor,' unless the context otherwise implies, includes any person whether a British subject or not, who at the time the act of bankruptcy was done or suffered by him . . . . (*c*) was carrying on business in England, personally, or by means of agent or manager." That sub-section clearly includes "B. C.," who was carrying on business in London by a manager. In *Vogeler's* case (3) Lord Halsbury, referring to the Bankruptcy Acts of 1869 and 1883, said: "I think the whole question must turn on the language of the two statutes. I am by no means prepared to say that it might not be a reasonable thing to apply the English law of bankruptcy to a trader who, though himself personally abroad, exercised a trade through the instrumentality of an agent, and possessed assets in this country capable of being reached by bankruptcy administration." It was, it is submitted, that passage which the Legislature had in mind when it drafted the Act of 1914.

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(1) L. R. 8 Ch. 374.

(2) [1901] A. C. 102, 109.

(3) Ibid. 102, 107.

[ROMER L.J. The relevant authority we have to consider appears to be *Ex parte Crispin.* (1) It is quite clear that the dictum of Mellish L.J. in that case was approved of by the House of Lords in *Vogeler's* case. (2)]

With regard to that dictum, Dicey on Conflict of Laws, 5th ed., para. 4, p. 313, says: "But it has been suggested or laid down by very high authority that a conveyance, or the like, made out of England must, if it is to be an act of bankruptcy, be a conveyance 'which is to operate according to English law.' To this suggested limitation or proviso it is hard to attach a very definite meaning. The proviso was perhaps intended to exclude from the character of acts of bankruptcy acts done abroad by a foreigner not domiciled in England, and not intended to operate at all according to English law, i.e. not intended to have any effect on property in England. But such a case would clearly not now, at any rate as regards 'debtors' as defined above, be outside the scope of the English bankruptcy law, the purpose of which would be defeated, and the express terms of the Act negatived, if it were held that it was not an act of bankruptcy, e.g. to assign all one's property in France to a trustee, or fraudulently, or in such manner as to operate a fraudulent preference." It is submitted that the view of Dicey so expressed is correct. The only point for decision before the House of Lords in *Vogeler's* case (2) was as to the meaning of "debtor." If "debtor" had been defined as it now is by s. 1, sub-s. 2, of the Act of 1914 the dictum in *Vogeler's* case (2) would not, it is submitted, have been laid down.

If a foreigner goes abroad and executes abroad a conveyance of property in England the presumption is that he intends that the conveyance should operate according to English law.

[The other grounds of appeal which do not call for a report were then dealt with.]

(1) L.R. 8 Ch. 374.

(2) [1901] A. C. 102.

R. P. Croom-Johnson K.C. and *Reginald Goff* for the respondents were not called upon to argue.

LORD WRIGHT M.R. The appeal here is from the learned Registrar, who has dismissed a bankruptcy petition presented by the petitioning creditor, for whom Mr. Salmon appears. The petitioning creditor is a Mr. Mund, a gentleman domiciled at Antwerp in Belgium ; he has based his petition on one or other of two acts of bankruptcy. The first is that the two debtors, whom I shall refer to as " B. C." and " G. W.," did on August 5, 1935, in the State of New York in the United States of America make a conveyance or assignment of their property to a trustee for the benefit of their creditors, and (2.) did on October 14, 1935, with intent to defeat or delay their creditors absent themselves from their place of business —namely, 118 Old Broad Street, London, and with the like intent did so continue to absent themselves. That second alleged or suggested act of bankruptcy it was admitted by Mr. Salmon cannot be relied upon, and he has in substitution applied to this Court, as he did apply to the learned Registrar, for leave to amend his petition by alleging as another act of bankruptcy that the debtors absented themselves from their place of business or residence in Paris with the intent which is dealt with in the Bankruptcy Act, to defeat or delay their creditors, on July 17, 1935. The learned Registrar, for the reasons he has set out at length, has refused to give leave to the petitioning creditor to amend his petition in that way. He has exercised his discretion, and this Court would be very loth indeed to interfere with the exercise by the Registrar of his discretion, especially in a matter of this sort, because, as has often been pointed out, in matters of bankruptcy the status of a debtor is affected if he is adjudicated a bankrupt, and, therefore, a greater strictness of procedure is proper in such cases than might now be allowed in general litigation. The Court accordingly see no reason to interfere with the discretion of the Registrar, although I do not say that the Court might not so act in an exceptional case which justified that course.

I must therefore turn to the matter which has been argued in this case by Mr. Salmon, who has put all his arguments before us with great force; that is the alleged act of bankruptcy said to be constituted by the conveyance of August 5, 1935. It is admitted that that act of bankruptcy would only be available against one of the debtors, the debtor to whom I have referred as " B. C." ; it does not apply to the other debtor, " G. W.," and that concludes the matter so far as " G. W." is concerned. But the case of " B. C." has called for, and must receive, further examination. The two debtors, " B. C." and " G. W.," carried on a business of private bankers or some other financial business—it is not very specifically put before us—at a number of places under the firm name or style of The Travellers Bank, with offices at Paris, Cannes, Nice, London, Geneva, Amsterdam, Shanghai, and at two places in the City of New York, Baltimore Street and 152 East 42nd Street. For some time " B. C." had been living in Paris ; he was a domiciled American like " G. W." Their branch in London was managed by an Englishman, who has been referred to as " D.," who had full authority from " B. C." to carry on the business of the London branch. On July 17, 1935, " B. C." left Paris. His office was closed, and apparently " D." felt it his duty and his right to wind up the affairs of the London branch and pay such assets as he had in settlement of the claims of the English creditors. It appears also that the debtors were made bankrupt in Paris, and that bankruptcy, I gather, has not been proceeded with.

In these circumstances, the question has to be determined whether the conveyance of August 5, 1935, constitutes an act of bankruptcy within s. 1, sub-s. 1 (*a*), of the Bankruptcy Act, 1914. That section is in these terms: " A debtor commits an act of bankruptcy in each of the following cases: (*a*) If in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally." That language accordingly in express terms makes it immaterial where the conveyance or assignment is executed. Sub-s. 2 of the same section defines who is a debtor within the meaning of that provision.

It provides: "The expression 'a debtor,' unless the context otherwise implies, includes any person, whether a British subject or not, who at the time when any act of bankruptcy was done or suffered by him (*a*) was personally present in England; or (*b*) ordinarily resided or had a place of residence in England; or (*c*) was carrying on business in England, personally, or by means of an agent or manager." On the facts of the present case it is clear that neither (*a*) nor (*b*) applies here, but it is equally clear that (*c*) applies, because "B. C." was at the material date carrying on business in England by means of an agent or manager although he was not personally present or ordinarily resident in England. It appears so far, therefore, that we have here a debtor within the meaning of the Bankruptcy Act, 1914, and a conveyance or assignment of his property to a trustee within the definition, because although it was not made in England but was made in New York, the definition in question includes the word "elsewhere," which obviously would cover a conveyance executed in New York. So far, therefore, the matter would clearly come within the definition of the Bankruptcy Act, 1914, which is immediately material.

Mr. Salmon has strenuously argued that there is no further matter to be considered in this connection, but that, in my opinion, is not so. The material question still remains —namely, whether the conveyance in this case is a conveyance or assignment of the debtor's property within the meaning of s. 1, sub-s. 1 (*a*), and whatever view I might have been disposed to take if the matter had been free from authority, I am of opinion that I am clearly bound by the decision of the House of Lords in *Cooke* v. *Charles A. Vogeler Co.* (1) That was a decision under the Bankruptcy Act, 1883, and the facts there were that the debtors were American subjects residing and trading at Baltimore, carrying on in England a branch of their business although they had never resided in England. In 1899 they executed in Baltimore a deed of assignment of all their property to their manager there, in trust to pay their debts. The question then arose whether

(1) [1901] A. C. 102.

that was an act of bankruptcy within the provisions of the Act of 1883, and the House of Lords held that it was not. They so held on two grounds, as I understand their judgment. One was that under the Bankruptcy Act, 1883, the then operative Act, the alleged debtors were not debtors within the meaning of the Act; but as I read the opinions in the House of Lords, I think they also decided the matter on an entirely different ground, which was that the conveyance or assignment was not an act of bankruptcy. The first ground I need not trouble with in any detail, because it may well be true to say, and I am disposed to think it is, that that ground no longer applies under the Act of 1914 by reason of the change which that Act has made, inasmuch as it has defined "debtor" in the sense I have indicated. Under the Act of 1883 there was no positive definition of "debtor"; there was merely a negative description. Sect. 6, sub-s. 1, of that Act was in these terms: "A creditor shall not be entitled to present a bankruptcy petition against a debtor unless . . . . (*d*) The debtor is domiciled in England, or, within a year before the date of the presentation of the petition, has ordinarily resided or had a dwelling-house or place of business in England." That obviously was not a definition, but a provision by way of exclusion, and the House of Lords in *Vogeler's* case (1) came to the conclusion that there was no positive provision in the Act as it then stood which would justify them in extending the category of "debtor" to a foreigner such as the particular party before them in that case. That difficulty I think is entirely removed by the definition of "debtor" which I have read in the Act of 1914, and I think on the true meaning of that definition "B. C." in the present case would come within the definition and would be a debtor.

But then that still leaves the question as to whether the deed of assignment which is before the Court on this occasion and which, so far as I can see, does not differ in any material detail from that which was before the House of Lords in *Vogeler's* case (1) constituted an act of bankruptcy.

(1) [1901] A. C. 102.

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Lord Wright M.R.

I think that, on what was said in *Vogeler's* case (1), it is impossible to say in this Court that it did constitute an act of bankruptcy, because on this particular point I think what *Vogeler's* case (1) laid down was that a deed of assignment or conveyance executed by a domiciled foreigner in his own country is not an act of bankruptcy within the meaning of the Bankruptcy Acts if it is to operate according to the law of the foreign country in which it is made. That is quite clearly stated by Lord Halsbury (2) in a passage quoted by him from *Ex parte Crispin* (3) in which he adopts the dictum of that very eminent judge, Mellish L.J. Lord Halsbury here laid down the general rule that English legislation is primarily territorial and primarily does not apply to foreigners. Then he deals specifically with the first of the two points and then quite separately, as I think, with the question of what constitutes, in circumstances of this nature, an act of bankruptcy. It must be borne in mind here that what is being said by Lord Halsbury is not matter of observation; he was dealing with the question then before him—namely, quite apart from any definition of the word "debtor," whether the facts before him did or did not constitute an act of bankruptcy. Lord Halsbury goes on to quote with approval the passages from *Ex parte Crispin* (3), and then says this (4): "Their Lordships"—that is to say, Lord Selborne and Mellish L.J., who were the judges in question—"then considered the effect of particular acts which were made acts of bankruptcy when committed out of England. 'The first is that a debtor has, in England or elsewhere, made a conveyance or assignment of his property to a trustee for the benefit of his creditors generally. This seems clearly intended to relate to a conveyance which is to operate according to English law, which a conveyance executed by a domiciled Englishman, although out of England, may do; but a conveyance executed by a domiciled foreigner in his own country must necessarily operate according to the foreign law, and we think it was never intended that such a conveyance should be an act of bankruptcy.' " These words are evidently directed to the definition of what is an act of bankruptcy in the Bankruptcy Acts. The language used in the Act of 1914, in s. 1, sub-s. 1 (*a*), is exactly the same as the language used in the Act of 1883, which is the language in reference to which Lord Halsbury applied these observations of Mellish L.J. Those observations, in fact, were directed to identical language in the Bankruptcy Act of 1869. To exactly the same effect I find in Lord Davey's judgment (1) this passage: " My noble and learned friend has referred to the case of *Ex parte Crispin* (2), decided by Lord Selborne and Mellish L.J. in the year 1873 under the Act of 1869. I will not trouble your Lordships by reading again the passages from the judgment of the Court delivered by the Lord Justice, which have already been read. It was there laid down that a foreigner trading in England is subject to the bankruptcy law, but that it is the act of bankruptcy which gives the Court jurisdiction, and that in the case of a foreigner that act of bankruptcy must be committed in this country or be an act intended to operate according to the law of this country." That is, as I understand it, saying that you cannot have an act of bankruptcy constituted by a conveyance executed abroad by a foreigner not domiciled in this country and intended to operate according to the law of the foreigner's domicil, which in this case before the House of Lords was the place where the conveyance was executed. To the same effect again Lord Davey says (3): " If, therefore (as I also think), one of the conditions and limitations on the exercise of bankruptcy jurisdiction against a foreigner domiciled and resident abroad is that the act relied on as an act of bankruptcy must have been done by the bankrupt within the jurisdiction, or at any rate (which is sufficient for the present purpose) if the execution of an assignment of his property by a foreign debtor in his own country is not an act of bankruptcy within the meaning of the statute—if that be so, I say, the jurisdiction has never arisen." It was not necessary there for Lord Davey to repeat

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(1) [1901] A. C. 102.
(2) Ibid. 108, 109.
(3) L. R. 8 Ch. 374.
(4) [1901] A. C. 102, 109.

(1) [1901] A. C. 112.
(2) L. R. 8 Ch. 374.
(3) Ibid. 114.

that he was dealing with an assignment made by a debtor in his own country that is to operate according to the law of that country. Lord Brampton also quotes with approval the passage which has already been referred to from the judgment of Mellish L.J. in *Crispin's* case. (1)

It is impossible, in my judgment, to dispose of the opinion of the House of Lords by saying that it is based upon the language of the Acts of 1869 and 1883, which has been changed in the present Act of 1914. As I have pointed out, the language material to this particular matter, namely, the definition of an act of bankruptcy, stands the same in every one of these three Acts. It is for that reason, although I have the greatest respect for anything that is said by the late Professor Dicey, that I cannot accept the opinion which he seems to put forward that the Act of 1914, by defining the word "debtor" as it has done, has rendered inapplicable the decision in *Cooke* v. *Charles A. Vogeler Co.* (2) It is perfectly true he points out that one of the reasons for that decision has become inapplicable because, as he says in his book on the Conflict of Laws, 5th ed., p. 314, n. (*o*): "The Act of 1914 by s. 1, sub-s. 2, has indeed rendered the actual decision in the case cited inapplicable, but that is because it makes one of the reasons for that decision inapplicable by clause (*d*). That provision brings under the scope of those who can commit bankruptcy any members of a firm carrying on business in England, thus remedying a defect of the old law." But I do not think, for the reasons I have stated, that that is a matter which is material here, because nothing in the language of the Act of 1914 in my judgment renders inapplicable the decision of the House of Lords defining for this purpose an act of bankruptcy. I say nothing at all on the argument which Mr. Salmon has put forward to show that the decision might perfectly well have been the other way; that is not material here because this Court is bound by that decision.

On these grounds, which are the grounds given by the learned Registrar, in my judgment the appeal fails and should be dismissed with costs.

(1) L. R. 8 Ch. 374

(2) [1901] A. C. 102.

ROMER L.J. I agree, but I should like, out of respect to Mr. Salmon's excellent argument, to say a word or two upon his first point.

In *Ex parte Crispin* (1) the Court, consisting of Lord Selborne L.C. and Mellish L.J., had to consider the point whether a particular foreigner was subject to the English bankruptcy laws, and the decision they came to was that if a foreigner comes to England and contracts debts in England and commits an act of bankruptcy in England, he thereby gives the Court of Bankruptcy jurisdiction over him. Mellish L.J., in delivering the judgment of the Court, after stating that the Court had come to that conclusion, said (2): "Then we think that a consideration of the particular acts which are made acts of bankruptcy when committed out of England will confirm this conclusion"—he was dealing with the Bankruptcy Act of 1869—"The first is, 'that the debtor has, in England or elsewhere, made a conveyance or assignment of his property to a trustee for the benefit of his creditors generally.'" It will be observed that those words are almost precisely the same as the words in s. 1, sub-s. 1 (*a*), of the Act of 1914. In connection with those words he says: "This seems clearly intended to relate to a conveyance which is to operate according to English law, which a conveyance executed by a domiciled Englishman, although out of England, may do; but a conveyance executed by a domiciled foreigner in his own country must necessarily operate according to the foreign law, and we think it was never intended that such a conveyance should be an act of bankruptcy." It will be observed, therefore, that the learned judge put that construction upon those words not because of the meaning of the word "debtor" in the Bankruptcy Act of 1869, though having so construed them, he was enabled to put a particular meaning upon the word "debtor" in the Act. Therefore it seems obvious that, whatever the meaning of the word "debtor" in the Act of 1869 had been, the learned Lord Justice, and for the matter of that Lord Selborne too, would have arrived at the same conclusion as to the meaning of the words which I have read.

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(1) L. R. 8 Ch. 374, 379.

(2) Ibid. 380.

In *Cooke* v. *Charles A. Vogeler Co.* (1) the House of Lords had to consider the case of a foreigner who while abroad had executed a conveyance or assignment of all his property to a trustee in trust for the benefit of his creditors generally. He had carried on business in this country but had never been personally in the country, having been represented here the whole time by an agent. The House of Lords held, first of all, that he was not a debtor within the meaning of the Act. That was the ground upon which Lord Halsbury and, I think, Lord Brampton, decided the case; but Lord Davey decided the case on this ground, that even if he were a debtor within the meaning of the Act, it was essential that the act of bankruptcy relied on should be an act of bankruptcy committed in this country, and, following *Ex parte Crispin* (2), held that inasmuch as in that case the assignment of all the debtor's property had been executed abroad and was intended to operate according to the foreign law, it was not such an act of bankruptcy as was described by the Act of 1883, which again repeated the words of the Act of 1869 which were construed in *Ex parte Crispin.* (2)

For these reasons, in addition to those already given by the Master of the Rolls, I agree that this appeal fails.

CHARLES J. I agree.

Appeal dismissed and leave to appeal to House of Lords refused.

Solicitors for petitioning creditor: *Kenneth Brown, Baker, Baker.*

Solicitors for debtors: *Gordon, Dadds & Co.*

(1) [1901] A. C. 102.

(2) L. R. 8 Ch. 374.

W. I. C.

In re STILLWELL.

STILLWELL *v.* STILLWELL.

BENNETT J.

1936

March 25.

[1935. S. 4049.]

Administration—National Savings Certificates—Nomination—Nominator afterwards of unsound mind—Order in Lunacy for payment into Court—Disposition—Person entitled to fund representing certificates—Lunacy Act, 1890 (53 *Vict. c.* 5), *s.* 117, *sub-s.* 1; *s.* 123, *sub-s.* 1 —*War Savings Certificates Regulations*, 1919 (*S. R. & O.* 1919, *No.* 2), *Nos.* 28, 29, 30.

The receiver of the property of a person of unsound mind (who before he became of unsound mind nominated certain National Savings Certificates to a nominee in accordance with the provisions of the War Savings Certificates Regulations) in pursuance of an order of the Master in Lunacy surrendered the certificates to the Post Office and the proceeds were invested in 3½ per cent. War Stock:—

Held, that that which was done under the order of the Master was a disposition by the receiver under the powers of the Lunacy Act; that s. 123, sub-s. 1, of that statute applied; and that the nominee was entitled to the property.

In re Walker. Goodwin v. *Scott* [1921] 2 Ch. 63 referred to.

ADJOURNED SUMMONS.

Edward Alfred Stillwell died intestate on February 20, 1934. The plaintiff was his administrator. In the year 1929 the testator was possessed of National Savings Certificates to the value of 580*l*. The rights of the persons who possessed them were governed by the War Savings Certificates Regulations of 1919 (1), which enabled the holder of certificates

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(1) The relevant regulations are as follows: "28. *A holder may nominate.* Subject to the provisions of these Regulations a person of the age of 16 years or upwards holding a certificate may nominate any person to receive any sum repayable in respect of a certificate and due to such holder at his decease, but a holder of a certificate or certificates may not have more than one nomination in force at any time.

29. *Requirements of a nomination.* Every such nomination shall be in writing in the prescribed form (or in some other form to be approved by the Postmaster-General) and shall be signed by the holder in the presence of a witness and shall be sent by post or otherwise to the Controller of the Money Order Department during the lifetime of the holder. Such nomination may be retained by the Controller of

to nominate persons to receive any sum repayable in respect of the certificates on the death of the holder.

On October 2, 1929, the deceased executed a nomination in writing in the prescribed form and thereby nominated his sister, the defendant Emma Anna Stillwell, to receive at his decease the whole amount then due to him in respect of the Savings Certificates held by him in his sole name at the date of his death.

On April 25, 1933, an order was made under the provisions of the Lunacy Act, 1890, appointing the defendant Emma Anna Stillwell receiver of the deceased's property. By that order it was provided that the receiver was authorized and directed to surrender to the Post Office the Savings Certificates and to request the proper officer of the Post Office to lodge in Court as thereinafter provided the amount payable in respect thereof.

In pursuance of that order the receiver surrendered the Savings Certificates, and 580*l.* 16*s.* 11*d.* was paid into Court in respect of them and was invested in the purchase of 577*l.* 2*s.* 9*d.* 3½ per cent. War Stock, interest on which was paid to the receiver during the life of the deceased.

The present summons was taken out by the testator's administrator for the determination of the question whether the sum in Court representing the Savings Certificates passed

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the Money Order Department.

30. *Revocation of nomination.* (1.) Any such nomination shall be revoked by the death of the nominee in the lifetime of the nominator or by the marriage of the nominator subsequent to the making of the nomination or by written notice of revocation signed by the nominator in the presence of a witness and sent to the Controller of the Money Order Department in accordance with the provisions of this Regulation, or by any subsequent nomination made by the nominator under these Regulations.

(2.) Any such written notice of revocation shall be sent by post or otherwise to the Controller of the Money Order Department during the lifetime of the holder.

(3.) Any such nomination shall not be revoked by any will or by any events or means other than those specified in this regulation.

(4.) Where the Postmaster-General has paid money to a nominee in ignorance of the fact that the nominator has married subsequently to the making of the nomination, the receipt of the nominee shall be a valid discharge to the Treasury and the Postmaster-General."

to Emma Anna Stillwell under the nomination or formed part of the estate of the deceased.

Neville M. G. Faulks for the plaintiff.

Roger Turnbull and *L. J. Acton Pile* for the respondent, Emma Anna Stillwell. The nomination has made the nominee an assign of the benefit of the certificates. That which was done under the regulations was a disposition within s. 123, sub-s. 1, of the Lunacy Act, 1890. (1) [They referred to *In re Harding* (2); *In re Alston. Sinclair* v. *Willes* (3); and *In re Palmer. Thomas* v. *Marsh.* (4)]

G. P. Slade for a person entitled to share in the estate of the deceased. Sect. 123, sub-s. 1, of the Lunacy Act, 1890, does not apply. There has been no such disposition as is contemplated by that section. The section is only intended to apply to a disposition of specific property and not to the mere dealing with a sum of cash. What was done by the order in Lunacy was not a disposition under the section, as it was merely the calling in of a debt. The case is analogous to *In re Walker.* (5) That case is an authority for the proposition that the mere calling in of a debt does not operate as a disposition under the section.

BENNETT J. [after stating the facts, said :] The point taken on behalf of the defendant, who contends that the proceeds of sale of the Savings Certificates form part of the estate of the deceased, is that what was done by the order of the Master in Lunacy was not a disposition under that section, and he relies on *In re Walker.* (5)

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(1) By s. 123, sub-s. 1, of the Lunacy Act, 1890, it is provided : " The lunatic, his heirs, executors, administrators, next of kin, devisees, legatees, and assigns, shall have the same interest in any moneys arising from any sale, mortgage, or other disposition, under the powers of this Act which may not have been applied under such powers, as he or they would have had in the property the subject of the sale, mortgage, or disposition, if no sale, mortgage, or disposition, had been made, and the surplus moneys shall be of the same nature as the property sold, mortgaged or disposed of."

(2) [1934] Ch. 271, 274.

(3) [1917] 2 Ch. 226, 229.

(4) [1911] W. N. 171.

(5) [1921] 2 Ch. 63.

BENNETT J.
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STILLWELL, *In re.*
STILLWELL *v.* STILLWELL.

In my judgment that argument is not well founded. I regard Savings Certificates as being in substance investments, and what was done under the order of the Master in Lunacy as being a disposition by the receiver under the powers of the Lunacy Act. The section applies, with the result that Emma Anna Stillwell is entitled to the property.

Solicitors: *Brash Wheeler, Chambers, Davies & Co.; Ford, Michelmore & Co., for Greenland, Houchen & Co., Attleborough.*

J. L. D.

C. A.
1932
April 5 (1).

WORCESTER CORSETRY, LIMITED *v.* WITTING.

[1932. W. 106.]

Company—Articles—Table A—Power of Company in general meeting to appoint directors—Power delegated to directors.

The articles of a company provided (art. 12): " Until otherwise determined by a general meeting the number of directors shall not be less than two nor more than seven." The articles also adopted arts. 83 and 85 of Table A, 1908 (2):—

Held, distinguishing *Blair Open Hearth Furnace Co.* v. *Reigart* (1913) 108 L. T. 665, that the power of appointing additional directors had not been delegated to the directors so as to exclude the inherent power of the company in general meeting to appoint directors.

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(1) Reported by request.

(2) Articles 83 to 85 in Table A in the First Schedule to the Companies (Consolidation) Act, 1908, are as follows:—

" 83. The company may from time to time in general meeting increase or reduce the number of directors, and may also determine in what rotation the increased or reduced number is to go out of office.

84. Any casual vacancy occurring in the board of directors may be filled up by the directors, but the person so chosen shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected a director.

85. The directors shall have power at any time, and from time to time, to appoint a person as

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APPEAL from a decision of Farwell J.

The action was brought by the plaintiffs, the Worcester Corsetry, Ld., William Henry Dark and Grace Lois Dark (his wife), against the defendants, Frank Witting, Ronald Courtenay Witting, and Aubrey Tremayne Witting, claiming (inter alia): (1.) a declaration that each of two resolutions passed at a general meeting of the plaintiff company held on January 6, 1932, whereby the defendants R. C. Witting and A. T. Witting were purported to be appointed directors of the plaintiff company, was ultra vires and of no effect and that the said defendants were not directors of the plaintiff company, and (2.) an injunction to restrain the defendants and each of them from in any manner acting upon the resolutions aforesaid or either of them and to restrain the defendants R. C. Witting and A. T. Witting from acting or purporting to act as directors of the plaintiff company or otherwise interfering in the management of the plaintiff company and to restrain the defendant F. Witting from acting or purporting to act as a director of the plaintiff company or otherwise interfering in the management of the plaintiff company otherwise than as a member of the board of directors of the plaintiff company consisting of the plaintiffs W. H. Dark and G. L. Dark and the defendant F. Witting.

The company was formed on February 9, 1929, with a capital of 20,000*l.* divided into 40,000 ordinary shares of 5*s.* each and 10,000 preference shares of 1*l.* each.

At the date of the writ in the action the defendant Frank Witting and those who were associated with him, held 7314 preference shares and 28,744 ordinary shares; Henry Dark and his wife held 2686 preference shares and 11,256 ordinary shares.

On December 7, 1931, certain shareholders signed a requisition asking that a special general meeting should be called and, in consequence of that requisition, a notice was given on

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an additional director who shall retire from office at the next following ordinary general meeting, but shall be eligible for election by the company at that meeting as an additional director."

December 24 that an extraordinary general meeting of the company would be held on January 6, 1932, at which resolutions were to be proposed whereby two new directors should be added to the board of directors, namely—Mr. Ronald C. Witting and Mr. Aubrey T. Witting. The meeting was held and two resolutions, that the two Mr. Wittings respectively should be appointed directors, were carried.

The question raised on the motion before Farwell J. was whether the two defendants R. C. Witting and A. T. Witting had been properly appointed additional directors by the company at its general meeting on January 6, 1932, or whether the power of appointing additional directors was under the company's articles vested in the directors alone.

The question turned on the construction of the company's articles of association, which are sufficiently set out in the judgments.

Farwell J., without expressing any view of his own, followed the decision of Eve J. in *Blair Open Hearth Furnace Co.* v. *Reigart* (1) and granted an injunction in the terms of the second clause in the statement of claim.

The defendants appealed. The appeal was heard on April 5, 1932.

Topham K.C. and *Meyrick Beebee* for the appellants. A company has an inherent power to appoint directors in general meeting—unless that power is expressly and exclusively delegated to the directors or other persons: *Barron* v. *Potter.* (2) Arts. 84 and 85 of Table A (1908) merely delegate to the directors power to fill casual vacancies and to appoint additional directors temporarily until a general meeting takes place. Art. 83 gives the company in general meeting express power to increase the number of directors. This can only be effective if the company can appoint the additional directors. In *Blair Open Hearth Furnace Co.* v. *Reigart* (1) the power given to the directors by the articles to appoint additional directors was quite general, and not a mere power to appoint temporarily until a general meeting. If necessary we submit that the *Blair* case (1) was wrongly decided. A power given to directors to appoint additional directors does not take away the power of the company in general meeting. There is no reason why the two powers should not be concurrent.

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(1) 108 L. T. 665.

(2) [1914] 1 Ch. 895.

Gavin Simonds K.C. and *J. G. Strangman* for the respondents. The *Blair* case (1) was rightly decided. Where the power to appoint additional directors is delegated to the directors the power of the company in general meeting to do so is impliedly excluded.

Art. 83 of Table A is only correlative to art. 12 of the company's articles, which provides that until otherwise determined by a general meeting the number of directors shall not be less than two or more than seven. Art. 83 only means that the company in general meeting can increase or reduce the maximum or minimum number. By art. 86 of Table A a director can only be removed by extraordinary resolution; the company could not under art. 83 reduce the directors by removing a director by ordinary resolution. Similarly the company cannot increase the number of directors by electing additional directors, the power to appoint additional directors being surrendered to the board by art. 85. A director so appointed may be re-elected by the company in general meeting under art. 85; but there is no power for a general meeting to appoint additional directors who have not been first appointed by the board.

LORD HANWORTH M.R. This appeal must be allowed. [His Lordship then stated the facts. He referred to *Blair Open Hearth Furnace Co.* v. *Reigart* (1), and continued:] The appeal has been argued before us on the basis that there are differences between that case and the present, to which I shall have to refer. Shortly put, however, the point is one of construction to be placed upon the articles of association of this company, the Worcester Corsetry, Ld. There are not many articles that we have to consider. The point we have to determine is whether under those articles there was power vested or still remaining in the company to appoint the two directors at the extraordinary general meeting held on January 6, 1932, or whether, following the decision of Eve J. in the *Blair* case (1), their articles had vested that power of appointment in the board and divested, in that sense, the power from the company in general meeting.

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(1) 108 L. T. 665.

In the *Blair* case (1) the position was this: By art. 82 it was provided: "Until otherwise determined by a general meeting the number of directors shall not be less than two nor more than seven." There was also art. 93: "Any casual vacancy in the office of director may at all times be filled up by the board by the appointment of a director. The directors may from time to time appoint additional directors, but so that the total number of directors shall not exceed the prescribed maximum." Eve J. in his judgment said this (2): "The defendants, on the other hand, contend that the power of appointing additional directors is prima facie a power exercisable by the corporators at large; that in order to displace that prima facie presumption a special contract whereby the corporators at large have delegated that power to some other body must be shown to exist; that the burden of establishing such a special contract rests upon those who assert it, and that these articles, so far from exhibiting any such special contract, contain provisions which go to negative its existence." In other words, he is dealing with the question whether the power of appointing additional directors was vested entirely in the directors to the exclusion of the power which would ordinarily belong to the general meeting. He goes on to say: "It is urged that the object and intent of that article"—that is art. 82, to which I have referred—"are defeated and rendered nugatory unless there is read into it an implied power vested in the company of making any resolution to increase the directorate effective by nominating and appointing additional directors up to the increased limit. I think there are serious difficulties in implying the reservation of any such power to the company."

(1) 108 L. T. 665.

(2) 108 L. T. 665, 670.

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He gives his reasons why he finds it difficult to think that there has been such a reservation to the company, and he goes on: "It follows from this that if the defendants are right in their construction of art. 82 there do exist in this company concurrent powers of appointing additional directors vested in the board by art. 93 and in the company in general meeting by art. 82." He comes therefore to the conclusion, ultimately, that the power of appointing additional directors had been divested from the company and had been entrusted to the board of directors to the exclusion of the company. I am bound to say that I find some little difficulty in seeing that the power must be either in the one or in the other; but be that as it may, we have to interpret the articles of association as we find them.

The articles of association of the Worcester Corsetry, Ld., adopt Table A of 1908 except and in so far as it is excluded. Art. 12, which was No. 82 in the *Blair* case (1), is as follows: "Until otherwise determined by a general meeting the number of directors shall not be less than two nor more than seven." But, unlike the *Blair* case (1), there is no exclusion of art. 83 of Table A, which is as follows: "The company may from time to time in general meeting increase or reduce the number of directors, and may also determine in what rotation the increased or reduced number is to go out of office." It is said, and I confess that I feel the weight of the argument presented by Mr. Gavin Simonds, that art. 83 is only correlative to art. 12, which is to be found in the articles of association. Art. 12 says that there is to be a maximum and a minimum of the number of directors until otherwise determined by a general meeting. Art. 83, carrying out that intention and purpose reserved in art. 12, says: "The company may from time to time in general meeting increase or reduce the number of directors"—so that, it is said, it would be unnecessary to have a special resolution. It is clearly laid down in art. 83 of Table A that some alteration can be made at a general meeting to increase or to reduce the number of directors. More than

(1) 108 L. T. 665.

that, the purpose of art. 83 is said to be indicated by the fact that if one looks at art. 86 in Table A one will see that the power to remove a director is to be carried out in a particular way and, therefore, if one is thinking of a reduction one finds specific limitations or restrictions of the power of exercising that reduction. For a time that argument impressed me a good deal, but I think we have to give effect to the whole of these articles; we have to read the articles which are adopted from Table A in conjunction with the articles which are specifically drawn up in the articles of association of the Worcester Corsetry, Ld. For my part I do not feel able to accept the argument presented to us by Mr. Strangman that we ought to have a freedom of construction in this type of small and, it may be, private company, which would enable us to bend the wording of some articles, whether in the specially drawn articles or in those to be found in Table A, in a manner in which we should think appropriate to such a company. It is rather an attractive argument to say that one may find oneself free to decide exactly how one likes without much attention to the wording of the articles, but however attractive, I must reject it and turn back to see what the articles say. In the argument which I have presented, as clearly as I can in accordance with Mr. Gavin Simonds' argument, I have not added or made use of the last portion of art. 83 of Table A, which is this: "and may also determine in what rotation the increased or reduced number is to go out of office." It is said that if you are adding to the number of directors you can increase the number of seven to eight, and you can say that the eighth director or the seventh director shall go out of office in a particular rotation relative to No. 3 or No. 4. But that does not seem to me to be a very satisfactory way of applying the articles to the real facts of the case.

It seems to me that in order to measure the value of these articles, one must remember that first of all the directors are determined in art. 68 by a majority of the subscribers to the memorandum. Art. 69 says: "The remuneration of the directors shall from time to time be determined by the company in general meeting," and that must be so always in respect of either original or the additional directors. Then in art. 71 you find the limitation of the power of the directors, whereby the business of the company is to be managed by the directors, and so on, who may exercise such of the powers of the company as are not, by the Act or any statutory modification thereof, or by the articles of association, required to be exercised by the company in general meeting. In other words, you will find that the directors have a derivative force given to them from the corporators in general meeting, and there are certain duties which are reserved to a general meeting. I think that although Mr. Gavin Simonds rightly said that the power of the directors is general, yet when one is considering the question of whether or not there is excluded from the powers of the company in general meeting a power which would otherwise appertain to the general meeting, one must bear in mind that the directors themselves are not the company ; the company are the corporators in general meeting, and the respective territories which appertain to the directors and to the general meeting are indicated by a close examination of the articles.

Turning now to the articles in question, I ask myself : Is it clear, as was found in the *Blair* case (1), that a power of appointing additional directors has been given expressly to the directors to the total exclusion of the powers of the general meeting ? I find myself compelled to give a different answer in the present case, and upon the present articles, from that which Eve J. gave in the *Blair* case (1) upon different articles and under different circumstances. It appears to me that although one may regard art. 83 as containing a complementary power to art. 12 of the Worcester Corsetry, Ld.'s articles, it is not right to construe it as giving a mere arithmetical meaning. Those last words, "and may also determine in what rotation the increased or reduced number is to go out of office," appear to me to indicate what was intended to be done in the ordinary course by the general

(1) 108 L. T. 665.

meeting. I need not refer to art. 84 in Table A, which deals with casual vacancies; but when we come to art. 85 we find: "The directors shall have power at any time, and from time to time, to appoint a person as an additional director who shall retire from office at the next following ordinary general meeting, but shall be eligible for election by the company at that meeting as an additional director." That is indicative of a temporary power vested in the directors which was to be reviewed and perhaps confirmed at the general meeting; but the article itself does not give any indication that the powers of the corporators in general meeting have been wholly taken from them and handed over to the directors.

When one comes to take these successive articles, and to weld them into accord with the special articles, is it possible to hold that there has been a complete exclusion of the powers of the general meeting and an entrustment to the directors, and only to the directors, of the power of appointing additional directors? Having regard to the purpose for which the articles are drawn it appears to me that it is certainly unnecessary to decide in the same way as Eve J. did, and upon a careful consideration, inasmuch as art. 83 was not in the table of articles he had to consider, we are able and ought to come to the conclusion that the rights and powers of the company in general meeting have not been circumscribed so as to prevent their being exercised by the corporators. Those powers have not been exclusively handed over to the directors.

For these reasons I have come to the conclusion that the appeal must be allowed and the injunction discharged.

LAWRENCE L.J. I agree. The question in this case is a short one and, in my opinion, entirely depends upon the true construction of the articles of the plaintiff company. Farwell J. felt himself unable to distinguish the present case from *Blair Open Hearth Furnace Co.* v. *Reigart* (1), which was decided by Eve J. in 1913. In that I think he was in error. That case depended upon the construction of the articles of the

(1) 108 L. T. 665.

Blair Company, and those articles differ from the articles we have to consider in two material respects. In the first place, there was no such article as art. 83 in the present case. In the next place there was there what the learned judge had held to be a complete surrender by the company to the directors of the company's inherent power to appoint additional directors, that was to be found in that case in art. 93. This Court is not concerned upon the present occasion to say whether the construction put upon the articles in the *Blair* case (1) by Eve J. was right or not; we have here to see what is the true meaning of the articles of the plaintiff company.

By those articles, art. 68 of Table A is excluded and in place of that we have art. 12, which provides: "Until otherwise determined by a general meeting the number of directors shall not be less than two nor more than seven." That article clearly points out that the company in general meeting can exercise its power to alter the articles in respect of the fixing of a minimum and maximum number of directors without having a special resolution to alter the articles. Then we find, following that, art. 83 of Table A, which to my mind is directed to a different purpose from merely altering the maximum and minimum number of directors. It provides: "The company may from time to time in general meeting increase or reduce the number of directors, and may also determine in what rotation the increased or reduced number is to go out of office." It is argued, and forcibly argued, by Mr. Gavin Simonds, that that is merely complementary to art. 12 and only empowers the company in general meeting to fix another minimum or another maximum, or both, under art. 12. In my judgment that is not so. Art. 83 of Table A shows in the plainest terms that the company has power to increase or reduce the number of its board. It is said that that does not involve the nomination and appointment of particular gentlemen or ladies as directors, but it seems to me that that is necessarily implied in the provision of art. 83. If, for instance, there have been four directors, within the maximum number of directors, and the board

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desire that two additional directors shall be appointed, it can convene, in my judgment, a meeting under art. 83 for the purpose of increasing the number of directors by two named persons, appointing those two persons, and thereby increasing the number of directors. Mr. Gavin Simonds tried to put this dilemma, that they cannot reduce the actual number of directors by getting rid of one of the directors in office; therefore, he says, you must read "increase" as not giving a power to increase by appointing named persons as directors. I think there is a fallacy underlying that argument. It is true that under art. 83 the company has no power to dismiss a director from his office because that is provided for by art. 86, and the only effective way that the company can reduce the number of its directors, if it thinks desirable to do so, unless it can pass a special resolution under art. 86, is to pass a resolution that in future or, if there is a vacancy, at the present moment, the directors shall be limited to three and not to four. The company has an inherent power to nominate and appoint its own directors unless that is in any way restricted by the contract contained in the articles of association. Unless you can find that that inherent power has been handed over by the company to the directors, I think they retain that power as a natural result of their having the power to increase their board of directors.

Now it is said—and this is the real point of Mr. Gavin Simonds' argument—that in the present case the company has surrendered its power to appoint additional directors and that the general powers which are conferred by art. 83 are reduced to merely stating the minimum and maximum numbers of the board. It is said that that surrender is contained in art. 85, which gives the board power to appoint an additional director who is bound to retire from office at the next following general meeting, in which event the company can re-elect him if it thinks fit. That power, in my judgment, is quite a different power to the power which the company has under art. 83. One can explain it best by giving an example. In the present case there are three directors: supposing the company in general meeting should desire to increase the number to seven and were to elect four additional directors, they could determine in what rotation those seven directors were to retire after the board had been fully completed by them to its utmost limit. A third of these directors under the present rotation of retirement would remain in office for three years. That shows at once that the power which is given to the company under art. 83 is quite a different power from that given to the directors, who can only fill up a vacancy or appoint an additional director on the terms contained in arts. 84 and 85.

In my judgment the reasoning in *Barron* v. *Potter* (1) is directly applicable to the present case. Warrington J. there decided, that where a board was unwilling to exercise a power to appoint additional directors in terms substantially identical with this power, the company had power to do so. He puts the question as follows (2): "Was the resolution passed at the general meeting of the company a valid appointment?"—that was a resolution in form the same as the resolution which has been passed in this case. It was an extraordinary meeting convened for the purpose of adding an additional director by name appointed by the company in general meeting. "The argument against the validity of the appointment is that the articles of association of the company gave to the board of directors the power of appointing additional directors, that the company had accordingly surrendered the power, and that the directors alone can exercise it." That is the precise question we have to deal with here. The learned judge then deals with both *Blair Open Hearth Furnace Co.* v. *Reigart* (3) and *Isle of Wight Ry. Co.* v. *Tahourdin* (4), and then at the end of his judgment he says this (5): "If directors having certain powers are unable or unwilling to exercise them—are in fact a non-existent body for the purpose—there must be some power in the company to do itself that which under other circumstances would be otherwise done. The directors in the present case being unwilling to appoint

(1) [1914] 1 Ch. 895.
(2) Ibid. 902.
(3) 108 L. T. 665.
(4) (1883) 25 Ch. D. 320.
(5) [1914] 1 Ch. 895, 903.

additional directors under the power conferred on them by the articles, in my opinion, the company in general meeting has power to make the appointment. The company has passed a resolution for that purpose, and though a poll has been demanded no date or place has yet been fixed for taking it. The result therefore is that I must grant an injunction on the motion in Canon Barron's action and refuse the motion in Mr. Potter's action." There the learned judge dealt with the point so stressed by Mr. Gavin Simonds. In that case I think there was an express power such as is contained in art. 83, but I do not think it appears from the report. The learned judge obviously thought that in the form of art. 85 it did not amount to a surrender of the power to nominate and appoint its own directors, but gave an additional power to the board for temporary purposes to appoint an additional director which appointment would come before the company for their consideration at the next annual general meeting, when it could either be affirmed or negatived as the company thought fit. Therefore, in my judgment, the powers are not at all concurrent in the present case, and, in any event, the power is one which is given to a board which is unwilling to exercise it when the company in general meeting considers it ought to be exercised. Therefore in that case the company has the power.

For these reasons I agree that this appeal succeeds.

SLESSER L.J. I am of the same opinion. I proceed to consider the matter from the other end and to ask myself, first, what are the powers of the directors to appoint additional directors at all? In my view the powers of the directors to make appointments are limited to the powers given to them in art. 85 of Table A to the following effect: "The directors shall have power at any time, and from time to time, to appoint a person as an additional director who shall retire from office at the next following ordinary general meeting." That provision indicates to me that a special emergency power for a limited period of appointing an additional director is given to the directors, which appointment lapses when the corporators would normally assume control over the appointment or the removal, as the case may be, of directors at their ordinary general meeting. I can find here no other power given to the directors to appoint directors at all. When we contrast that power with the power given to the directors by art. 93 in the *Blair* case (1), we see that there: "The directors may from time to time appoint additional directors, but so that the total number of directors shall not exceed the prescribed maximum." There is no limitation there as to the time for which such additional directors shall serve, and that is one matter which distinguishes this case from the *Blair* case. (1) In addition to that limitation of power of the directors to appoint in the present case, in my opinion the company are in terms by art. 83 given a power themselves to appoint directors, which power is not directly to be found in the articles of the *Blair* case. (1) In my view art. 12 of the plaintiff company's articles, which says: "Until otherwise determined by a general meeting the number of directors shall not be less than two nor more than seven," is dealing with a different subject-matter and has a different intent from art. 83. I think that art. 12, which corresponds in terms with art. 82 in the *Blair* case (1), is dealing with the total number of possible directors. The machinery for varying that number is contained in art. 12, because it says that the number of directors shall not be less than two nor more than seven until otherwise determined by a general meeting. That article contains within itself all the machinery for fixing the maximum and minimum number of directors. I do not think that art. 83 is dealing with such a matter. Art. 83 gives to the company in terms power to increase the number of directors. I put this question to Mr. Gavin Simonds for my information: Supposing the company increased the number of directors, or purported to do so, under art. 83 and then the directors who, on Mr. Gavin Simonds' argument, have the power alone to make the appointment, do not make the appointment; have the company increased the number of the directors or have they not, because in fact the increase which they had authorized under art. 83 would never have been made? The more natural view of art. 83 is that it is not redundant or merely introducing unnecessary machinery which is already provided by art. 12 in dealing with the maximum and minimum, but, as Lawrence L.J. has indicated, is itself conferring a power not only to increase the number but to increase that number by itself appointing directors to the extent to which it is intended to increase the number. That view is supported by the considerations urged by my Lord with regard to the latter part of that clause, which gives to the company power to determine in what rotation the increased or reduced number of directors is to go out of office. It clearly, in my opinion, contemplates, among other things, that the rotation of those persons may be a rotation indicated by their names as well as by the proportion in which they are to retire. Finally I draw attention to the last part of art. 85 of Table A, which in terms says, that in any event the directors who have been appointed as additional directors are eligible for re-election by the company, which indicates that in that case at their ordinary general meeting the company have power to elect directors. That power is also missing in the *Blair* case. (1)

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(1) 108 L. T. 665.

For these reasons, and also because I do not think that the inherent power of the corporators to direct the control of their own company by nominating the directors is excluded by any contract contained in the articles of association, I think this appeal must be allowed.

Appeal allowed.

The plaintiffs subsequently consenting to treat the motion as the trial of the action the action was dismissed.

Solicitors for the appellants: *Hatchett Jones & Co.*
Solicitors for the respondents: *Burchells.*

(1) 108 L. T. 665.

W. I. C.

ASH *v.* DICKIE.

C. A.
1936
April 28.

[1833. A. 2388.]

Copyright—Infringement—Articles infringing copyright in book—Publication of articles in newspaper—Damages for conversion of infringing copies—Method of assessment—Copyright Act, 1911 (1 & 2 *Geo.* 5, *c.* 46), *s.* 7.

When the copyright of a book has been infringed by some of a series of articles appearing in a daily newspaper and the author claims damages for conversion against the newspaper proprietors under s. 7 of the Copyright Act, 1911, the basis on which damages should be assessed is by taking the sale price as the value of each copy of the newspaper containing an infringing article and then estimating the proportion of the total value of the infringing copies as so ascertained which should be attributed to the infringing articles appearing therein. The matter must be one of estimate.

So *held* by the Court of Appeal, reversing the decision of Bennett J.

John Lane The Bodley Head, Ld. v. *Associated Newspapers, Ld.* [1936] 1 K. B. 715 approved.

Appeal from a decision of Bennett J.

This action was one in which the plaintiffs claimed relief in respect of the infringement by the defendants of the copyright in a literary work of which the plaintiff Ash was the author and which he called " The Practical Dog Book." The defendants to the action were James Dickie and a limited company called the Daily Sketch and Sunday Graphic Ld.

The defendant Dickie was the author of the literary matter which was held at the trial to be an infringement of the plaintiff's copyright. Dickie wrote a number of articles which infringed that copyright, and these articles were printed and published by the defendant company in their newspaper the Daily Sketch. After the articles had appeared in the Daily Sketch the defendant Dickie incorporated them in a book called " The Dog " of which he claimed to be the author, and which book he caused to be printed and published.

The judgment of Bennett J., dated February 18, 1935, contained an undertaking by the defendant company to refrain from infringing the copyright of the plaintiff Ash in

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the literary work entitled "The Practical Dog Book," and an order upon the defendant Dickie to restrain him from infringing the said plaintiff's said copyright, and the following inquiries were directed, that is to say: (1.) an inquiry what damages, if any, had been sustained by the other plaintiff up to June 7, 1934, by reason of infringement by the defendant James Dickie of the copyright in the said work, and by reason of the conversion of infringing copies of the said work or of any substantial part thereof by the defendants the Daily Sketch and Sunday Graphic Ld.; (2.) an inquiry what damages, if any, had been sustained by the plaintiff Ash since June 7, 1934, by reason of the same matters.

On the inquiry before the Master the parties agreed that he should not make separate findings as to the damages sustained by each plaintiff, but that he should make one finding to cover the damages sustained by both plaintiffs over the whole of the relevant period.

The Master's certificate, dated December 18, 1935, excluding formal parts, was in the following terms: "At the request of counsel for the plaintiffs and the defendants, I have treated the two plaintiffs as one person for the purpose of the said inquiries. The plaintiffs have up to the 7th June, 1934, and since that date, sustained damage by reason of infringement by the defendant James Dickie of copyright in the work in the judgment mentioned to the amount of 52*l.* 10*s.*, and by reason of the conversion of infringing copies of the other work or of any substantial part thereof by the defendants the Daily Sketch and Sunday Graphic Limited, the amount of 10*l.*"

The present summons was taken out by the plaintiffs to vary the Master's certificate.

There was no complaint as to the damages awarded by reason of the infringement of the plaintiff's copyright. As regards the damages sustained by the plaintiffs by reason of the conversion by the defendant company of infringing copies of the said work, the plaintiffs attacked the Master's finding.

On March 20 Bennett J., in giving judgment, said that the amount of the damages depended entirely upon the value of the infringing copies of the plaintiff's work sold by the defendant company and this value was not easy to ascertain. The facts were that the defendant Dickie wrote twenty-six articles on various breeds of dogs and sold these articles to the defendant company. He was paid by the defendant company one guinea for each article. The learned Master came to the conclusion of fact that in sixteen of these articles the defendant Dickie had infringed the copyright in "The Practical Dog Book." These articles were published by the defendant company in sixteen different issues of their newspaper the Daily Sketch. The learned Master, in awarding 10*l.* to the plaintiffs, had acted on the principle of valuing the weight of the paper on which the infringing articles were printed on the footing of its worth for pulping and by that process had arrived at his figure of 10*l.* His Lordship continued as follows:—

The principle upon which the learned Master proceeded cannot, as it seems to me, be supported. The chattels which the defendant company has converted are not mere materials for pulp; they consist of paper, print upon the paper and of an incorporeal property conveyed to the mind by means of the print on the paper. The value of the chattels is, as it seems to me, the aggregate of the value of these elements.

There is no difficulty about the value of the incorporeal property; I should take that to be worth what the defendant company paid for it—namely, one guinea for each article. I have no evidence upon which I can judicially arrive at a conclusion as to the value of the paper upon which the articles were printed; nor have I any evidence upon which I can judicially act as to the value of the printing; but both figures would, I should think, be comparatively small.

In my judgment the Master's certificate must be varied by setting aside his finding that the damages sustained by the plaintiffs by reason of the conversion of infringing copies of "The Practical Dog Book" or of any substantial part thereof by the defendant company is 10*l.*; and, unless the parties agree that I should assess the damages in respect of this cause of action as best I can upon such materials as are now before the Court, the matter must go back to the Master with a direction (1.) that there must be an inquiry as to damages sustained by reason of the conversion by the defendant company, upon the footing that in respect of each issue of the Daily Sketch in which an infringing article was published one guinea is to be taken as the value of the infringing literary matter in all copies of that issue ; (2.) that there is to be ascertained the value of the paper used for the printing of the infringing articles ; (3.) that there is to be ascertained the value of the printing of such articles ; and that the damages are the aggregate of these three elements.

The plaintiffs appealed. The appeal was heard on April 28, 1936. There was also a cross-appeal by the defendant company.

K. E. Shelley and *G. T. Aldous* for the appellants. It is submitted that in estimating the damages for conversion under s. 7 of the Copyright Act, 1911, the following rules should be observed: (1.) Damages for conversion are the value of the chattels converted at the time of the conversion. (2.) If a large number of the chattels have been freely bought and sold by many persons this is strong evidence that the value of each chattel is the price paid for it, and prima facie this should be taken as the value. (3.) If the publication is in its entirety an infringing copy, the damages for conversion are the published price multiplied by the number of copies actually sold, plus the value of unsold copies. (4.) If only part of the publication is an infringing copy, e.g., one-hundredth, then the damages for conversion are a corresponding proportion of the amount arrived at under (3.), viz., 1/100th.

If this method had been arrived at the damages would have been 35*l.* an article multiplied by 16, the number of the articles, making 560*l.*

The method of assessment of damages under s. 7 was considered by du Parcq in a somewhat similar case of *John Lane The Bodley Head, Ld.* v. *Associated Newspapers Ld.* (1).

Fergus Morton K.C. and *H. S. G. Buckmaster* for the respondents. The chattel which the respondent company have converted is a strip of paper with an article on dogs by the plaintiff Dickie printed on it and the question is what is the value of that chattel to the plaintiffs. It is submitted that the test is how much better off would the plaintiffs have been if that chattel instead of being sold had been handed over to them.

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(1) [1936] 1 K. B. 715.

It is submitted that the course adopted by the Master was the right one.

[They referred to *Livingstone* v. *Rawyards Coal Co.* (1); *Reid* v. *Fairbanks* (2); *Ewbank* v. *Nutting* (3); *Muddock* v. *Blackwood.* (4)]

K. E. Shelley replied.

Lord Wright M.R. This is an appeal from an order of Bennett J., made on an application to vary the certificate of a Master on the assessment of damages in the action. The action was brought by the two plaintiffs for damages for infringement of copyright, and was against Mr. James Dickie and the Daily Sketch and Sunday Graphic, Ld., the publishers of a well known illustrated daily newspaper called the Daily Sketch. Mr. Ash had written a book about dogs, and Mr. Dickie, who was apparently a regular contributor to the newspaper in question in matters relating to dogs, had, as it was alleged, and as in fact had been found, infringed the copyright of the work of Mr. Ash in a number of issues in which Mr. Dickie's articles had been included.

There were two plaintiffs as appears on the writ, one Mr. Ash, the author, and the other Mrs. Cortauld. She in fact owns the copyright, because Mr. Ash, having become a bankrupt, his trustee in bankruptcy sold the copyright in these productions, and they were purchased by Mrs. Cortauld, I gather, largely or entirely in the interests of Mr. Ash.

The action was brought for an infringement, and various remedies were claimed. Against Mr. Dickie the remedy claimed was in respect of infringement by copying the matter complained of, and as against the defendant newspaper the

(1) (1880) 5 App. Cas. 25.

(2) (1853) 13 C. B. 692.

(3) (1849) 7 C. B. 797.

(4) [1898] 1 Ch. 58, 64.

remedy claimed was under s. 7 of the Copyright Act, 1911, a section which has recently been considered by this Court in *Sutherland Publishing Co.* v. *Caxton Publishing Co.* (1).

The terms of the section are in effect that " all infringing copies of any work in which copyright subsists, or of any substantial part thereof, and all plates used or intended to be used for reproduction of such infringing copies, shall be deemed to be the property of the owner of the copyright " —that is Mrs. Cortauld in this case—" who accordingly may take proceedings for recovery and possession thereof or in respect of the conversion thereof."

Upon that claim against the newspaper an order was made for the assessment of damages and the matter was referred to the Master, who found that there were infringements in sixteen articles out of the twenty-six articles written by the defendant Dickie and published in the newspaper ; and on that finding he had to assess the damages in conversion. For that purpose it was not disputed that a very large number of copies containing these infringements had been disposed of.

The question is : What is the proper method of assessing the damages in conversion ?

The Master came to the conclusion that with regard to conversion damages were to be arrived at by calculating the actual value to the owner of the thing which could have been delivered back—that is, sixteen cuttings from the newspapers containing the articles. The value of these cuttings, he said, was merely pulp paper, and on the basis that all that was in question was the pulp value of the strips of paper he proceeded to make an award by a method of weighing. Each of these articles covered about one column of the paper—that is, one side of that column. On the other side was some other article or illustration. The Master weighed the Daily Sketch as a whole and found that each issue of the paper weighed about 2½ ounces. He took each of the articles as one-fiftieth of the paper, and on that basis found the amount of damages for conversion of the sixteen articles to be 10*l*., that is, 12*s.* 6*d.* for each article. That is what I may call the method of estimating the damages by weight.

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(1) [1936] 1 Ch. 323.

When the matter came before the learned judge he adopted another method. He first of all took what I may call the pulping basis, but he thought that there were other elements to be taken into account. He therefore sent the matter back to the Master for further determination, with a direction " that the value of the converted chattels is to be ascertained upon the footing (1.) in respect of each issue of the Daily Sketch in which an infringing article was published one guinea is to be taken to be the value of the infringing literary matter in all the copies of that issue ; (2.) that there is to be ascertained the value of the paper used for the printing of the infringing articles ; and (3.) there is to be ascertained the value of the printing of these articles ; and that the damages are the aggregate of these three elements."

It seems, therefore, that he added to what I may call the pulping-value basis of weight two further elements, one the cost, or rather the amount, which he regarded as the value of the literary matter, and the other what he called the value of the print.

There is an appeal against these orders, and a cross-appeal against the judge's order by the respondents to this appeal. The respondents to this appeal say that the Master's order was right, and that the only value which can be attached to the converted articles is the mere value of the paper ascertained by weight, disregarding everything else. On the other hand the plaintiffs appeal against the order of Bennett J. and say that the true measure of damage is to be ascertained on another footing, that is to say, that the Court has to determine what is the value of each converted article—that is to say, each copy of the newspaper—containing the infringement which has been sold by the defendants, and that prima facie at least the value is to be arrived at by ascertaining what the defendants received on the sale of each copy.

That involves, no doubt, a somewhat difficult calculation, because, as we have seen, each article is only a small portion of the totality of each issue ; and therefore, if that measure

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of damages is taken, a very difficult question has to be determined—namely: How much of the value of the totality of the issue is to be appropriated to the particular article which constitutes the infringement? This forms either one-fiftieth or one-hundredth of the total contents of each weekly publication.

Mr. Shelley has been content to admit that the appropriate proportion is one one-hundredth; and if the value is taken on that basis of calculation to be one penny, which is the amount realized by each copy when sold, then you get a rule of three sum which has been worked out, and which, reduced to pounds, shillings and pence, is 3500*l.*, or 35*l.* for the one one-hundredth.

Mr. Morton has attacked that method. His argument is that the damages have to be determined by estimating what is the damage to the plaintiffs. He emphasizes the words " to the plaintiffs," because his argument is that the plaintiffs have to be conceived as entirely abstracted from the circumstances of the actual publication of the newspaper, and imagined as having a large number of strips of paper in their possession, with no marketing facilities, with no connection or organization. He then says that if such a case is postulated it will be found that the plaintiffs have suffered no damage at all by the conversion except such damage as can be determined by ascertaining the value of the paper. On that basis he is prepared to accept the finding of the Master that the damage is 10*l.*, and no more.

I do not think that that is the true measure of damages, nor do I think that the measure of damages applied by the judge is correct. He has not taken the true measure, which is the value of the articles at the time of the conversion; that I shall discuss in a moment. He has considered various elements of expense which, according to his finding, have gone to the production of these strips of paper which in his opinion have added to the pulp value of the paper—certain expenses which have been incurred in producing the print of the paper; and he has ordered that the damages shall be arrived at on that basis.

But in estimating damages for conversion the question is not what it has cost to produce the article, but what the article is worth. In my judgment, in a case like this, the value must be ascertained by a calculation and an estimate.

This in effect was the course adopted by du Parcq J. in *John Lane The Bodley Head, Ld.* v. *Associated Newspapers, Ld.* (1), which again was a case of a newspaper article complained of as an infringement, and found to be an infringement. du Parcq J., in proceeding to find the value of the various articles at the date of the conversion under s. 7, said: "I think that I ought not to regard the expenses of producing the newspaper as a relevant fact. It is not, however, my view that I can arrive by any exact arithmetical process at the sum which it is proper to award. Let it be granted that the plaintiffs are entitled to the full price received for the sheets containing the story 'The Gods Decide'; it still does not follow that the fraction of each penny paid for the paper which is proportionate to the space occupied by 'The Gods Decide' must be taken to have been paid for that story. I cannot but think that the paper was bought by many who had no intention of reading the story and by some who did not know that the paper contained a story. Others again may have paid the whole of their penny for the pleasure of reading 'The Gods Decide.' Taking everything into consideration, and making the best estimate (if that word be not too flattering) of which I feel myself to be capable on the evidence, I assess the damages for conversion at 50*l.*"

In other words, the learned judge, as I follow him, is saying that the proportionate method of calculation which he has indicated at least offers a starting point, because it is at least a starting point in assessing the value of a chattel which has been converted, to find what the chattel has realized by the sale. That may or may not be the value. If, for instance, in this particular case, the infringing article had filled the whole of one issue, there can, I think, be little doubt that the price realized by that article would give (at least prima facie, and it may be conclusively) the correct

(1) [1936] 1 K. B. 715, 722.

amount of damages for the conversion; but the difficulty here is to apportion to the particular fraction of the space occupied by the article what is the appropriate amount of the price realized; and I do not think that can be arrived at by any exact method of calculation. I think it must be a matter of what has been called rusticum judicium, and it is quite obvious that if a passage is taken from any one newspaper the proportionate value of any particular article as compared with the totality of the articles may vary enormously. One article may be of minor importance, or very little importance, perhaps, in the total sale of the paper. Another article may be of first-rate importance, and may constitute very nearly the entire value of the whole issue.

We have here no materials at all for assessing by that comparative method the value of the articles in question in each of these issues compared with the total value of the issues as a whole. Therefore, as I have said, though no doubt the total amount realized by the sale of all the articles may be used as a basis, that must be subject to a very substantial diminution, particularly having regard to the position in which this Court is left on the evidence.

Before I deal with the actual figures I should like to refer to some of the authorities which have been cited. I have taken as my basis and starting point the ordinary prima facie rule in conversion, that the damages are the value of the chattel at the time of the conversion. That is a rule which is not quite universal, because there are exceptions. In some cases the amount realized may give no real indication as to what the true value of the chattel is. For instance, in *Ewbank* v. *Nutting* (1) a cargo of salt was wrongly sold by the master. It was a forced sale, the proceeds were comparatively small. It was held that the defendants were liable in conversion, and that the jury had to arrive at the best estimate of damages that they could, and that they were entitled to estimate the damages, disregarding the amount actually realized by the forced sale, at the cost price of the salt and the sum paid for the freight.

(1) 7 C. B. 797.

We have also been referred to a judgment of Kekewich J. in *Muddock* v. *Blackwood* (1), where the claim was in conversion in a copyright case under the Copyright Act of 1842, the corresponding section to s. 7 of the Act of 1911, and Kekewich J. said (2): "In my opinion he [the plaintiff] is entitled to the delivery-up on oath of all books in the defendant's possession, as in an action of detinue; and to damages, as in an action of trover, for the books the defendant has sold." He bases his estimate on the actual figures realized, but there were no circumstances to suggest any other method.

In *Reid* v. *Fairbanks* (3), another case referred to by Mr. Morton, a ship had been converted while in an uncompleted state, and the defendant had completed the ship and thereby increased her value. It was held that damages had to be ascertained by finding the value, as far as it could be assessed as a matter of estimate, of the ship in her uncompleted state; and the best method of doing that, according to the view of the Court, was to estimate what would have been the value of the ship if completed as originally indicated, according to the original contract, for the plaintiff, and from that to deduct money which would necessarily have been laid out after the date of conversion to complete according to the contract.

These are all cases which illustrate that by some method the question to be solved is what is the value of the chattel at the date of the conversion.

I ought also to refer to the case relied upon by Mr. Fergus Morton, *Livingstone* v. *Rawyards Coal Co.* (4), but there the question of damages arose with reference to a taking of coal from underground. It was a curious case, because there was in fact a small island of coal under the plaintiff's land which could not be approached except by underground workings all of which were vested in other owners. It was held that there was a special rule applicable to such cases, which was thus stated by Lord Blackburn (5): "Now, my Lords, there

(1) [1898] 1 Ch. 58.
(2) Ibid. 58, 64.
(3) 13 C. B. 692.
(4) 5 App. Cas. 25.
(5) Ibid. 39.

was a technical rule in the English Courts in these matters. When something that was part of the realty (we are talking of coal in this particular case) is severed from the realty and converted into a chattel, then instantly on its becoming a chattel, it becomes the property of the person who had been the owner of the fee in the land whilst it remained a portion of the land; and then in estimating the damages against a person who had carried away that chattel, it was considered and decided that the owners of the fee was (*sic*) to be paid the value of the chattel at the time when it was converted, and it would in fact have been improper, as qualifying his own wrong, to allow the wrongdoer anything for that mischief which he had done, or for that expense which he had incurred in converting the piece of rock into a chattel, which he had no business to do. Such was the rule of the Common Law. Whether or not that was a judicious rule at any time I do not take upon myself to say; but a long while ago (and when I say a long while I mean twenty-five years ago) Mr. Baron Parke put this qualification on it, as far as I am aware for the first time. He said, if however the wrongdoer has taken it perfectly innocently and ignorantly, without any negligence and so forth, and if the jury, in estimating the damages, are convinced of that, then you should consider the mischief that has been really done to the plaintiff who lost it whilst it was part of the rock, and therefore you should not consider its value when it had been turned into a piece of coal after it had been severed from the rock, but you should treat it at what would have been a fair price if the wrongdoer had bought it whilst it was yet a portion of the land as you would buy a coal-field." (*Wood* v. *Morewood.* (1))

Mr. Morton relied on that in support of his contention that one is not really concerned with the value of a chattel in a case of conversion, but really only with its value to the plaintiffs who for the purpose are treated as severed from the actual conditions, and they are treated, as it were, as persons isolated and having the converted chattel placed upon them against their will and under circumstances in which they themselves could make no use of it. I do not think that is the true test at all. As I have already said, the damages in the case of conversion under s. 7, as in every other case of conversion, are the value of the chattel at the time of the conversion; and in a case of this sort the best evidence of that value may well be what the wrongdoer obtained by disposing of the chattel.

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(1) (1841) 3 Q. B. 440 *n.*

That leaves only one difficulty—namely to determine what is the appropriate value in this case, on the material circumstances which I have stated. This Court is not minded to send the case back to the Master for a further reference and account. The case is one in which the Court ought to act under Order LVIII., r. 4, and make such order as it appears to the Court ought to have been made by the Tribunal below. As I have said, with the materials before the Court the matter can only be one of estimate, and the Court must act as the jury would act in similar circumstances and must arrive at the best estimate it can.

I think that the claim as put forward by Mr. Shelley is very considerably in excess of what is a fair compensation, or rather a fair estimate of damages. The damages which I think ought to be awarded for the conversion are 100*l*. The appeal will be allowed accordingly, and the cross-appeal dismissed. The plaintiffs will have costs in both cases.

SLESSER L.J. I agree, and have very little to add. When this case is rightly understood, the only problem which calls for consideration is what at the time of conversion was the value of this property of the plaintiff, deemed to be his by virtue of s. 7 of the Copyright Act, 1911, which has been wrongly converted. A view has been expressed by the Master, which although it has been varied by the learned judge, was not differed from very much; that you are to look, at any rate primarily, at the physical pieces of paper on which this infringing article was written (which by the operation of s. 7 become the property of the owner), to ascertain the value and consequently the damage suffered in conversion. That seems to me altogether an unreal way of looking at the problem. At the time of the conversion this article, the physical paper on which the article was printed, was part of a general complex of articles in a physical collection of paper known as the Daily Sketch, the value of which as a whole was one penny a copy. I think that is a matter which ought to be taken into consideration when we consider what was the value of the plaintiffs' share of this aggregate compound at the time of the conversion. It is certainly something more than the mere physical paper.

If the paper as a whole at that time was worth one penny a copy, that seems to me a right standard from which to start—having applied the due proportion which the plaintiffs owned in that compound—to ascertain how much each paper was worth. Starting from that basis, it becomes a matter of estimate, not at all an easy one, what was the value at the time of the conversion of the plaintiffs' share in the newspaper. I agree with my Lord that the sum which he has indicated of 100*l.* is a fair estimate of that amount.

The question of principle here involved is an important one. Leaving aside for the moment the further consideration of the learned judge, which for myself I cannot accept, that we can look to what the defendant company paid to Mr. Dickie, which with every respect does not seem to be relevant to the problem, two ways of looking at this matter appear to have emerged, the one indicated by the learned judge and the Master, and the other by du Parcq J. in *John Lane The Bodley Head, Ld.* v. *Associated Newspapers, Ld.* (1) As I read the judgment of du Parcq J., he did that which here I have suggested is the right method, and which is the method which has found approval by my Lord—that is, he first of all asked himself what was the value of the newspaper as a whole, and he took for granted that the plaintiff was entitled to the full price received for certain sheets, and then he asked himself what proportion of the whole selling value of the paper was rightly to be attributed as the value to the plaintiff so that he had lost that value by the conversion.

(1) [1936] 1 K. B. 715.

I approve of the method employed by du Parcq J. in principle, as I understand the case which has been cited to us of *John Lane The Bodley Head, Ld.* v. *Associated Newspapers, Ld.* (1), and I disapprove of the method applied in this case by the Master and Bennett J. I think that substantially what we are here deciding, the figures being different and the considerations varying, is the same in principle as the method employed by du Parcq J. in solving this difficult problem. I agree that this appeal must succeed, and the cross-appeal fail.

ROMER L.J. I agree, but as we are differing from Bennett J. and the learned Master, I should like to express as shortly as may be my reasons for so doing.

The first thing to be ascertained in this case is what is the chattel which by virtue of s. 7 of the Copyright Act, 1911, has to be deemed to be the property of the plaintiffs. Mr. Shelley rightly concedes that the chattel does not consist of the whole paper in which the infringing article appeared, but is merely that portion of the paper upon which the infringing article was printed. In other words, the chattel is a part, though a physically separable part, of a composite chattel, the other part of the composite chattel being the property of the defendants. But that chattel which is to be deemed to be the property of the plaintiffs was wrongly converted by the defendants, though I agree innocently, and the plaintiffs are accordingly entitled to damages for that conversion.

I agree with Mr. Morton that a plaintiff in such circumstances is entitled to recover by way of damages the value to him of the chattel at the time of its conversion, or, to put it another way, that the plaintiff is entitled to be placed financially in the same position as he would have been in had the conversion never taken place. But then Mr. Morton goes on to argue that the value to the plaintiffs of their chattel at the date of conversion was no more than the value of that chattel as pulp, and that if the chattel had been handed over physically to the plaintiffs, and had been retained by them, they would not have been able to dispose of it, and that therefore they suffered no damage by virtue of its conversion. They would, says Mr. Morton, if they get no damages, be in the same financial position as they would have been in if the conversion had not taken place. But, with great respect to Mr. Morton, it appears to me that that argument is based upon a fallacy, and the fallacy is this, that the argument disregards altogether the only available means which the plaintiff had of selling his chattel to profitable account. The only way in which the plaintiff could have turned the chattel to a profitable account was to combine with the owners of the other part of the composite chattel and sell the composite chattel as a whole. If the chattel had been divided up and the plaintiff's part handed to him, and the defendants retained their part of the chattel, neither of them could have disposed of his own part to advantage. It is quite plain that the defendants could not have sold a paper with one column cut out of the middle of it, and yet we find that when the composite chattel is sold as a whole its value was one penny a copy, because we are entitled to treat the value as being the price for which the copies were in fact sold. So, too, if the plaintiff was to be regarded as being in possession of his part of the composite chattel, Mr. Morton's argument treats him as retaining that bit of the composite chattel himself, whereas in point of fact, of course, what he would have done would have been to combine with the defendants in selling the composite chattel as a whole, in which case he would have received a part of the purchase price of the composite chattel.

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(1) [1936] 1 K. B. 715.

I agree with the other members of the Court that the part of that composite price to be assigned or attributed to the plaintiff's chattel is not necessarily a one-hundredth part of the price for which the composite chattel was sold. It does not at all follow that the value of the portion of the paper which contained the article bore the same proportion to the total price that the space occupied by the article bore to the whole space of the paper. We are told that this paper is an illustrated paper, and one knows perfectly well that

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some parts more especially of an illustrated paper are more valuable, or are considered to be more valuable to the public, than other parts of the paper. We ought to do, I think, what du Parcq J. did in the case cited to us, and on the materials before us form the best estimate that we can of the value to the plaintiff of his part of the composite chattel at the date of conversion; and I agree with the Master of the Rolls that in the circumstances that value should be taken to be 100*l*.

I agree accordingly that the appeal succeeds and the cross-appeal fails, and that an order should be made as indicated by the Master of the Rolls.

Appeal allowed and cross-appeal dismissed.

Solicitors for appellants: *Paisner & Co.*
Solicitors for respondents: *Theodore Goddard & Co.*

W. I. C.

In re MARR'S WILL TRUSTS.

WALKER *v.* ATTORNEY-GENERAL.

EVE J.
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[1936. M. 228.]

Charity—Will—Testator domiciled in England—Trust creating educational charity in Scotland—Scheme for application of funds cy-près —Reference to Court of Session to settle scheme—Form of Order.

A testator who was a native of Scotland but died domiciled in England gave his residuary estate upon trust, after payment of annuities, to establish educational charities in and for the benefit of the residents of a town in Scotland. After the building and opening of a college in the town, there remained a large sum of money in the hands of the trustee subject to the trusts of the will. Upon an application to settle a scheme cy-près, the Court, at the instance of the Attorney-General, gave liberty to the trustee to carry into effect a scheme for the administration of the charity to be settled by the Court of Session in Scotland.

Attorney-General v. *Lepine* (1818) 2 Swanst. 181 applied.

EVE J.

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MARR'S WILL TRUSTS, *In re.* WALKER *v.* ATTORNEY-GENERAL.

SUMMONS.

The summons was taken out by Sir Alexander Walker as sole trustee of the testator's will, and asked that directions might be given by the Court as to carrying into effect a proposed scheme for administering a charitable trust created by the will of the testator, Charles Kerr Marr, who died domiciled in England on February 15, 1919.

The testator, who was a native of Scotland, by his will dated August 2, 1917, gave all the residue of his estate to his trustees upon trust for conversion and investment and declared that they should stand possessed of his residuary estate upon trust, after providing for the payment of certain annuities and all costs charges and expenses, to apply the same in the advancement of education as they should in their absolute discretion think fit in one or more of the following ways: (1.) in granting prizes or rewards to persons bona fide resident in the burgh of Troon, Ayrshire, who had been scholars in public elementary schools; (2.) in or towards the building or maintenance of any public school or schools, elementary or otherwise, in the burgh of Troon. The testator further directed that at the expiration of ten years from the date of his death or as soon thereafter as circumstances should permit his trustees should devise a scheme for the advancement of the education of persons who were or had been bona fide resident in Troon and to appoint trustees for the purpose of carrying such scheme into effect. The scheme was to contain such terms, regulations and conditions as his trustees should in their absolute discretion think fit, and if they both died before any scheme could be devised, the testator desired the Charity Commissioners for England to devise a scheme to carry out his intentions.

The testator declared that as he had an English domicil it was his intention that his will and any codicil thereto should be construed and operate so far as the law admitted according to English law.

The testator's will was proved in the Principal Probate Registry by the executors, Thomas Frank Neighbour and Alexander Muir, on April 12, 1919.

Since the testator's death the trustees had framed a scheme for the establishment of different classes of bursaries and had distributed prizes and awards to persons qualified. An agreement was entered into between the trustees and the Ayrshire Education Authority dated June 10, 1926, for the erection and administration of a secondary school or college at Troon, and on an application to the Court by the trustees, Astbury J. by an order dated January 16, 1928, gave liberty to the trustees of the will to carry the agreement into effect as a proper cy-près application of the funds of the said will. The reason it was described as cy-près was because the site of the proposed college was not within the burgh of Troon, but adjacent to it. Since then Marr College, as it was called, had been built and opened, and governors appointed. After this was done there was still in the hands of the plaintiff, as trustee of the will, the sum of approximately 420,000*l*. The trustees of the will then began to prepare a scheme for the future government and management of the Marr Trust.

By a deed of appointment dated February 20, 1928, and made between the said Thomas Frank Neighbour of the first part, the said Alexander Muir of the second part, and the applicant, Sir Alexander Walker, of the third part, the applicant was appointed a trustee of the testator's will in place of Alexander Muir, who retired from the trusts thereof. The said T. F. Neighbour died on October 2, 1933, leaving the applicant sole trustee of the will.

On January 1, 1929, the Educational Endowments (Scotland) Act, 1928, came into force, providing for the creation of Commissioners with extensive powers for settling schemes of education in Scotland. In 1930 the Commissioners appointed under the Act held two inquiries into the Marr Trust and Marr College endowment, and in 1931 they published a draft scheme. This scheme was submitted to the Scottish Education Department for their approval but was not approved. The Commissioners then prepared an amended scheme and submitted it to the Department in February, 1934, but objections to the scheme were lodged by the trustee and the Town Council of Troon and it was not approved. The Commissioners in a letter to the Department of June 18, 1934, informed them that they did not propose to proceed any further in the matter. The effect of that was to leave the trustee of the will free to bring forward a scheme in accordance with the trusts of the will subject to the approval of the Court. The scheme now brought forward by the trustee, known as the "C. K. Marr Educational Trust Scheme," had been examined by Mr. J. S. C. Reid K.C. and Mr. J. F. Strachan, Advocates, of Edinburgh, who expressed the opinion that it was in accordance with Scots law. The scheme provided that it was to come into effect when the same had been finally approved by the Court of Chancery in England and the Court of Session in Scotland, and after that date the Marr Trust fund, excluding therefrom Marr College, rector's and masters' houses, sports pavilion, playing fields and equipment, was to be held administered and applied exclusively in accordance with the conditions of the scheme.

The Attorney-General suggested that as the final decision had to be taken by the Court of Session in Scotland, the reference to the Chancery Division should be omitted, and this was agreed to by the trustee.

The plaintiff took out this summons asking (1.) that the scheme might be approved by the Court as a proper application cy-près of the trust funds in his hands, and (2.) that the plaintiff might be authorized and directed to apply to the Court of Session for the establishment of the said scheme and for authority to carry the same into effect, and (3.) that directions might be given to the plaintiff as to the scheme and the carrying of the same into effect.

Fergus D. Morton K.C. and *Wilfrid Hunt* for the plaintiff stated the facts and explained the scheme in detail.

A. Andrewes Uthwatt for the Attorney-General. The Attorney-General regards this as a very complicated and important matter, but he is not in a position to investigate the merits of the disputes between the Commissioners and the Scottish Education Department. The general practice is to refer the matter to the Scottish Court of Session to settle a scheme.

It is proposed that this should be done, but that the order should be prefaced by a statement that there is no objection, so far as the law of England is concerned, to the trustee producing the scheme to the Court of Session for its opinion. This will not hamper the Court of Session in any way, and the Attorney-General sees no objection to it. That was done in *Attorney-General* v. *Lepine.* (1) In that case the learned judge ordered a reference to Chambers to settle a scheme to be submitted to the Scottish Court, but the Court of Appeal held that that was not the proper function of the English Court.

EVE J. You can take the order. This scheme seems to have been framed with the greatest possible care and desire to give the charity all the advantages from this splendid benefaction. The costs of all parties as between solicitor and client will be paid out of the general funds in the hands of the trustee.

The terms of the order were as follows: The Court being of opinion that there is no objection under the law of England to the trustee submitting to the Court of Session for its consideration the scheme which is Exhibit AW2 to the affidavit of Sir Alexander Walker filed on March 19, 1936, subject to the deletion from clauses 2 and 3 of the scheme of the words "both the Court of Chancery in England and," order that the trustee may be at liberty to carry into effect any scheme so settled by the Court of Session.

Solicitors: *Tamplin, Joseph, Ponsonby, Ryde & Flux; The Treasury Solicitor.*

(1) 2 Swanst. 181.

H. L. L.

Considered. *Re* BEAUMONT'S WILL TRUSTS. [1950] 1 All E.R. 802.

Applied. *In re* BEAUMONT'S WILL TRUSTS [1950] 1 Ch. 462

CLAUSON J.

1936

April 30.

In re GEORGE HOBSON THOMPSON (DECEASED).

THE PUBLIC TRUSTEE *v.* HUSBAND.

[1936. T. No. 282.]

Will—Administration—Solvent estate—Residuary realty and personalty devised and bequeathed to same persons—Incidence of death duties—Personal estate primary fund for payment of legacies before recourse to the real estate—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *s.* 34, *sub-s.* 3; *s.* 53, *sub-s.* 3; *Part II. of the First Schedule, clauses* 2, 8 (*b*).

A testator bequeathed an annuity and certain legacies and devised and bequeathed all his real and personal estate not otherwise devised or bequeathed to certain persons. He left personal estate and real estate of considerably greater value.

Questions arose in connection with the incidence of certain death duties, whether an annuity and legacies were for that purpose to be treated as payable primarily out of the residuary personalty or out of the realty and personalty in proportion to their values:—

Held, that the law in force before the Administration of Estates Act, 1925, as regards the primary fund for payment of legacies as between the personal and real estate has not been altered by s. 34, sub-s. 3, of clauses 2 and 8 (*b*) of Part II. of the First Schedule to that Act, and that the personal estate must be treated as primarily liable, and recourse will not be made to the real estate until the personal estate has been exhausted.

In re Boards. Knight v. *Knight* [1895] 1 Ch. 499 followed.

In any case for the purpose of determining the incidence of death duties this result is effected by clause 8 (*b*) of Part II. of the Schedule.

ADJOURNED SUMMONS.

George Hobson Thompson by his will dated December 11, 1930, appointed Thomas Buxton Flint to be sole executor and trustee thereof and bequeathed to Miss Emma Wilson Husband during her life an annuity of 300*l.* to begin at the death of the testator and he empowered his trustee to appropriate a sufficient part of his estate as a fund for answering such annuity by the annual income thereof and declared that when the said annuity should cease the appropriated fund should sink into and form part of his residuary estate. The testator also bequeathed to Robert Jackson Youle a legacy of 1000*l.*, to

Dr. John William Youle a legacy of 1000*l.*, to Daphne Flint a legacy of 1000*l.*, and to Sarah Wood and Mary Wood in equal shares 200*l.*

The testator gave to the said John William Youle all the testator's plate stored at Lloyds Bank and any articles of personal jewelry. The testator devised and bequeathed all his real and personal estate not thereby otherwise devised or bequeathed as to one third part thereof to the Buxton Cottage Hospital and as to two third parts thereof to the Royal Devonshire Hospital at Buxton, both such legacies to be known as the Hobson Thompson Legacies.

By a codicil to his said will dated January 3, 1933, the testator revoked the appointment of the said Thomas Buxton Flint as executor and trustee of his will and appointed the Public Trustee to be sole executor and trustee of his will and codicil and bequeathed to Leah Arnold, Haymarket, Buxton, a legacy of 100*l.* and directed that that legacy and all those bequeathed by his will should be free of legacy duty and he gave and bequeathed to the said Emma Wilson Husband all his personal effects wherever situated to be disposed of as she thought fit and in all other respects he confirmed his said will.

The testator died on January 9, 1935, and his will with the codicil thereto was proved by the Public Trustee on May 15, 1935.

The estimated gross value of the testator's estate at the time of his death was personal estate 2458*l.* 18*s.* 10*d.* and real estate 13,475*l.* After payment of estate duty, debts and funeral and testamentary expenses and deducting the value of the specific bequest of plate the net value of the personal estate was 1791*l.* 2*s.* 3*d.* The real estate was sold, and after paying estate duty thereon and the costs of sale the net value of the proceeds of sale was 11,809*l.* 2*s.*

There was ample estate to provide a fund for payment of the annuity after payment of the legacy, but the annuitant preferred to be paid a lump sum, which it was estimated would be 1921*l.* Certain questions arose in respect of the said annuity, and the Public Trustee took out the present summons for their decision, to which he made parties the annuitant, Robert Jackson Youle, one of the pecuniary legatees, and the respective trustees of the two hospitals, who were residuary legatees and devisees.

The questions asked were as to the incidence of the payment of legacies between the real and personal estate and the consequent incidence of the estate duty on the real estate between the legacies and annuity and the residue; as to the liability of the annuity to pay legacy or succession duty and for leave to pay the capital value of the annuity to the annuitant.

In the course of the arguments it was decided that the annuity was a legacy, and was free from legacy duty, but not free from succession duty.

F. C. Watmough for the Public Trustee, pointed out that the personalty was not sufficient to provide for the annuity and legacies, which must partly fall on the realty, and that the question to be decided was whether or not ss. 34, sub-s. 3, and 53 of the Administration of Estates Act, 1925, and Part II. of the First Schedule to that Act had altered the old law that in such a case the personalty was primarily liable and must be exhausted before the realty was applied.

Hon. Charles Russell for the annuitant. Before the operation of the Administration of Estates Act, 1925, the rule was that, when legacies had to be paid out of both personalty and realty, the personalty was primarily liable and must be exhausted before recourse was made to the realty unless the testator had by the wording of his will created a mixed fund for the payment of legacies. This was the effect of *Boughton* v. *Boughton* (1); *Tench* v. *Cheese* (2); and *Roberts* v. *Walker.* (3) The question is whether s. 34, sub-s. 3, and Part II. of the First Schedule to the Act of 1925 has altered the old method of dealing with this mode of administration. I submit that the general reference to property in paras. 1 and 2 of Part II. of the Schedule is not sufficient to change the old

(1) (1848) 1 H. L. C. 406.
(2) (1855) 6 D. M. & G. 453.
(3) (1830) 1 Russ. & M. 752.

established principle. If the personalty and realty are to provide for the legacies pro rata the legacies will have to bear an increased death duty on the part of the realty that is to be used; but s. 53, sub-s. 3, of the Act says that nothing in the Act shall " alter the incidence of any death duties." The words of the provision in the Act would not, if contained in a will before the Act, have affected the primary liability of the personalty, and I submit that being contained in the Act they do not do so. If it had been intended to exonerate the personalty and onerate the realty it would have been easy to say so. Moreover in the codicil the testator directs that the legacies shall be free of legacy duty but he says nothing about succession duty, and this, I submit, shows that he intended the legacies to be paid primarily out of personalty.

P. M. Walters for the pecuniary legatee. I am in the same interest as Mr. Russell and I adopt his argument. The point is only important in this case as regards the incidence of succession duty. Sect. 34 did not purport to deal with legacies at all and they are only dragged in in the Schedule. Can a section which has nothing to do with legacies affect the incidence as regards legacies? Some of the text-books seem to assume that the Administration of Estates Act, 1925, has changed the incidence of payment of legacies as between personalty and realty. See Halsbury, Laws of England, 2nd ed., vol. 14, p. 384, Note (*h*); Jarman on Wills, 7th ed., p. 1023; and Snell's Equity, 21st ed., p. 268.

Tomlin J. in *In re Emerson. Morrill* v. *Nutty* (1) doubts whether the Act has thrown the personalty and realty into what he calls " the common pot." I say that there is no " common pot " as far as legacies are concerned.

W. S. Norwood for the trustees of the Buxton and District Hospital, formerly known as The Buxton Cottage Hospital. I would refer your Lordship to s. 41, sub-s. 1, of the Administration of Estates Act, which gives the personal representative power to appropriate any part of the real or personal estate in satisfaction of a legacy, which may have some bearing on the question. I would also ask you to look at

(1) [1929] 1 Ch. 128.

Diamond on Estate Duties, 6th ed., p. 212, where the author says that the incidence of duty must be dealt with on the lines of *In re Spencer Cooper* (1), where the legacies were borne pro rata.

[CLAUSON J. Can I look at this book? I thought the practice of the Court was to look only at text-books prepared by members of the Bar, which this book is not.]

Norwood. I refer to it, as it is acted upon by the Taxing Authorities. The practice before the Act is laid down in *In re Boards* (2), where the facts were practically the same as those in the present case. My clients really wish me to argue in the same way as Mr. Russell and Mr. Walters. I cannot find any authority to support a contrary position, though it would be, in fact, to my advantage to support a pro rata incidence.

Charles Romer for the trustees of the Royal Devonshire Hospital. My clients are entitled to two-thirds of the residue. If one goes into the history of the old practice it probably arose from tenderness for the heir which caused a tendency to exonerate the real estate as much as possible from the legacies. The heir has now ceased to exist, and one of the objects of the recent legislation was to assimilate real and personal estate in every way. The testator here gave his trustees power to appropriate the annuity fund out of any part of his estate. Whether the reason for the rule was to benefit the heir or because only personalty formerly vested in the executors, the reason has now gone. It cannot support the proposition that the personal estate is still primarily liable.

CLAUSON J. The testator in this case appointed an executor and gave certain legacies and an annuity, and after dealing with those legacies and that annuity proceeded in these terms: " I devise all my real and personal estate not hereby otherwise devised or bequeathed as to one third thereof to the Cottage Hospital, Buxton, and as to two thirds thereof to the Devonshire Hospital, Buxton, both of these legacies to be known as the Hobson Thompson Legacies." He left behind him

(1) [1908] 1 Ch. 130.

(2) [1895] 1 Ch. 499.

personal estate and real estate. The personal estate is sufficient to pay a substantial amount on account of the legacies, but is not sufficient to discharge the legacies in full, and in the term "legacies" I include the annuity, which is a legacy.

The law which operates in these circumstances is well settled, and I will take the statement of it from the headnote in *In re Boards* (1): "When a testator bequeaths legacies, and then bequeaths the residue of his real and personal estate, the legacies are charged upon the real estate or its proceeds, but they are payable primarily out of the personalty, unless the testator directs that they are to be paid out of the mixed fund, in which case they are paid rateably out of realty and personalty." So the strict way to administer this estate is to pay the legacies out of personalty so far as it will go, and so far as there remains something payable upon the legacies that is charged upon realty. The materiality of the matter is this, that the duties payable may be affected. So far as regards the beneficial interests the matter is of no practical importance in this particular case, where the residuary realty and personalty go to the same destination. It is suggested that having regard to certain provisions of the Administration of Estates Act, 1925, the rule stated in *In re Boards* (1) is no longer the law. It is suggested that by that Act an alteration has been made which results in the law now being that when a testator bequeaths legacies and then bequeaths the residue of his real and personal estate, the legacies are not payable primarily out of the personal estate, but are payable out of the realty and personalty pro rata according to the proportions of the realty and personalty. The suggestion that that is now the law is founded upon this, that by s. 34, sub-s. 3, of the Administration of Estates Act it is provided that "Where the estate of a deceased person is solvent"—that is of course the case here—"his real and personal estate shall subject to Rules of Court and the provisions hereinafter contained as to charges on the property of the deceased, and to the provisions, if any, contained in his will, be applicable towards the discharge of his funeral

(1) [1895] 1 Ch. 499.

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testamentary and administration expenses debts and liabilities payable thereout in the order mentioned in Part II. of the First Schedule to this Act." Part II. is headed "Order of application of assets where an Estate is solvent." The first clause provides for the case of a deceased person having died intestate as to part of his estate. The second clause is in these terms: "Property of the deceased not specifically devised or bequeathed, but included (either by a specific or general description) in a residuary gift, subject to the retention out of such property of a fund sufficient to meet any pecuniary legacies, so far as not provided for as aforesaid." The last words mean, so far as not provided for out of the part of the estate as to which the testator died intestate. It is suggested that the effect of that provision is to alter the law, and to provide that the fund which is to be retained out of residuary realty and personalty in order to meet pecuniary legacies is to be retained in the following way: that a proportionate part is to be retained out of realty and personalty pro rata of the amount of the realty and personalty respectively. The provision does not say so, and the provision is not concerned with any such matter. The provision is concerned with the way in which funeral testamentary and administration expenses, debts and liabilities are to be met. There is no indication there that there is any intention of altering the law in respect of the rights of the legatees as against those interested in the residuary personalty and residuary real estate, or in respect of the rights inter se of those interested in the residuary realty and personalty respectively, as regards bearing the charge of legacies, and I can see no foundation for the suggestion that that provision has in any way altered the law as laid down in *In re Boards.* (1)

Another point was mentioned. I was referred to clause 8 (*b*), which runs thus: "This part of this Schedule does not affect the liability of land to answer the death duty imposed thereon in exoneration of other assets." I should have thought that the effect of that clause would be that, even if

(1) [1895] 1 Ch. 499.

I had been able to hold that this Act by this Schedule altered the law in *In re Boards* (1) for the purpose of ascertaining the incidence of death duties, the estate would have to be notionally administered as though the Act had not been passed. However, that point does not arise if by the Act there is no alteration of the law as laid down in *In re Boards.*(1)

Solicitors: *Donald McMillan & Mott; Charles Russell & Co., for Smallpeice & Merriman, Guildford; Warden & Gowing; Cree & Son; Winter & Co.*

E. K. C.

In re SKEATS.

THAIN *v.* GIBBS.

[1936. S. 551.]

CLAUSON J.
1936
May 6.

Will—Appointment of testator's wife executrix—Direction to pay debts and funeral and testamentary expenses—No gift or disposition of property—Executrix trustee for persons entitled on intestacy—Executors Act, 1830 (11 *Geo.* 4 *and* 1 *Will.* 4, *c.* 40)—*Administration of Estates Act,* 1925 (15 *Geo.* 5, *c.* 23), *ss.* 46, 49, 55, *sub-s.* 1 (vi).

A will made on a printed form contained an appointment of the testator's wife as executrix and a direction to pay debts and funeral and testamentary expenses, but no gift or disposition of property to any person:—

Held, that the executrix took the testator's estate as trustee for the persons entitled to the property of an intestate, including herself, as set out in s. 46 of the Administration of Estates Act, 1925.

The repeal by that Act of the Executors Act, 1830, has not restored the law in force before the latter Act was passed under which an executor took property which was undisposed of beneficially.

SUMMONS.

The testator, Robert Skeats, made his will dated July 17, 1912, as follows, omitting the name and description of the testator and the testatum: "I hereby revoke all wills by me at any time heretofore made I appoint my wife Mary Skeats to be my sole executor and direct that all my just debts and funeral and testamentary expenses shall be paid as soon as conveniently may be after my decease I give and bequeath unto . . . ." The will was made on a printed form, leaving the last blank unfilled. The testator died on March 20, 1929, and his will was proved by his widow, Mary Skeats, on August 3, 1929. The assets of the testator consisted of a house at Isleworth, where he and his wife lived, personal property, money in the bank and investments, the total value being about 3650*l.*

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(1) [1895] 1 Ch. 499.

Mrs. Skeats after her husband's death continued to live in the same house and made no distinction between her own property and her husband's estate. She made a will dated May 15, 1929, thereby appointing the plaintiff and her sister, the defendant Catherine Gibbs, executors, and gave all the residue of her estate to the said defendant absolutely. She died on May 5, 1935, and her will was duly proved by the executors on October 4, 1935.

The plaintiff took out this summons to have it determined whether by virtue of her appointment as sole executrix of the will the widow became beneficially entitled to the whole of the testator's residuary estate subject to payment of his debts and funeral and testamentary expenses, or whether such residuary estate ought (subject to provision being made for the testator's widow under s. 46, sub-s. 1 (i.), of the Administration of Estates Act, 1925 (1)), to be held upon trust for the persons entitled under the provisions of the said section.

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(1) Administration of Estates Act, 1925, Part IV. (Distribution of Residuary Estate), s. 46, sub-s. 1: "The residuary estate of an intestate shall be distributed in the manner or be held on the trusts mentioned in this section . . . ." Sect. 49: "Where any person dies leaving a will effectively disposing of part of his property, this Part of this Act shall have effect as respects the part of his property not so disposed of, subject to the provisions contained in the will and subject to the following modifications . . . .

(*b*) The personal representative shall, subject to his rights and powers for the purposes of administration, be a trustee for the persons entitled under this Part of this Act in respect of the part of the estate not expressly disposed of unless it appears by the will that the personal representative is intended to take such part beneficially."

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M. O'Connell Stranders for the plaintiff.

F. E. Skone James for the defendant Gibbs. Before the passing of the Executors Act, 1830, where a will only appointed an executor and made no other disposition of property the executor took the whole estate beneficially: *Love* v. *Gaze.* (1) That Act altered the law, and thereafter, until the passing of the Acts of 1925, in such a case the executor took as trustee for the next of kin according to the Statutes of Distribution. But the Administration of Estates Act, 1925, repealed the Executors Act, 1830, and the only section replacing that Act is s. 49. That section only deals with wills effectually disposing of part of the testator's property. The personal representative is made a trustee for the next of kin as to any part of the estate not expressly disposed of. It does not apply to cases of complete intestacy, and therefore in such cases as the present the law which was in force before 1830 is restored.

[CLAUSON J. referred to s. 46 of the Administration of Estates Act, 1925.]

The will must be read as having given the property beneficially to the executor. The will does not dispose of any of the property of the testator, for the direction to pay debts and funeral expenses is implied by law, and is not a "disposition" of money.

[He referred to Williams on Executors, 8th ed. (1879), Part III., Book III., pp. 1480 and 1486.]

If I am wrong on this point, then I rely on the evidence that there was an agreement between husband and wife to make mutual wills in each other's favour.

W. F. Waite for a defendant representing the next of kin. This is a will which does not effectually dispose of part of the property of the testator. There is no means of paying the testator's debts, except out of his estate.

Sect. 55, sub-s. 1 (vi.): "Intestate" includes a person who leaves a will but dies intestate as to some beneficial interest in his real or personal estate.

(1) (1845) 8 Beav. 472.

I submit that the testator died intestate.

The definition of "intestate" in s. 55 includes a person who leaves a will, but dies intestate as to some beneficial interest in his real or personal estate. Although a person who leaves a will cannot ordinarily be spoken of as an "intestate," here the testator died intestate within the meaning of the definition of the word in the Act.

Before 1830 an executor took beneficially what was not disposed of by the will, and the reason was that neither the Ecclesiastical Courts nor the Courts of Equity had any means of getting it from him. The testator would have died testate if the property which the executor took had been given to him beneficially by the will.

The Act to be construed is the Administration of Estates Act, 1925, which has defined the word "intestate" in special terms.

Skone James replied.

CLAUSON J. The testator, Robert Skeats, made his will on July 17, 1912. He thereby revoked all wills of his made at any time theretofore, and he appointed his wife, Mary Skeats, to be his sole executrix. He directed that all just debts, funeral and testamentary expenses should be paid as soon as conveniently might be after his decease. Then appear in his will the words: "I give and bequeath unto"; there follows a gap which he never filled up. He died on March 20, 1929, and his will was admitted to probate. By his will he appointed an executrix, but unless the appointment of the executrix operates to dispose of the beneficial interest in his property he made no effective disposition of the beneficial interest.

Assuming that the testator had died before 1830, the operation of this will would have been to vest the property in the executrix at law. In certain circumstances a court of equity would have treated the executrix as a trustee for the next of kin, but on this will I am satisfied that, as the law then stood, the executrix would have taken the property, and would have been entitled to retain it beneficially.

In the year 1830 the law was changed by the enactment of the Executors Act, 1830, with the following preamble: "Whereas testators by their wills frequently appoint executors, without making any express disposition of the residue of their personal estate: And whereas executors so appointed become by law entitled to the whole residue of such personal estate; and courts of equity have so far followed the law as to hold such executors to be entitled to retain such residue for their own use, unless it appears to have been their testator's intention to exclude them from the beneficial interest therein, in which case they are held to be trustees for the person or persons (if any) who would be entitled to such estate under the Statute of Distributions, if the testator has died intestate: And whereas it is desirable that the law should be extended in that respect." The Act proceeds to enact that when any person shall die, after September 1, 1830—"having by his or her will, or any codicil or codicils thereto, appointed any person or persons to be his or her executor or executors, such executor or executors shall be deemed by courts of equity to be a trustee or trustees for the person or persons (if any) who would be entitled to the estate under the Statute of Distributions, in respect of any residue not expressly disposed of, unless it shall appear by the will, or any codicil thereto, the person or persons so appointed executor or executors was or were intended to take such residue beneficially." Then there is a proviso with which I am not concerned.

If the testator in the present case had died before the coming into force on January 1, 1926, of the Administration of Estates Act, 1925, the Executors Act, 1830, would have applied. The effect of this will would have been to appoint the widow executrix, but she would be a trustee for the persons who would take under the Statutes of Distribution which, in the circumstances of the case, there being no children, would be herself and certain other relatives. However, the testator did not die before that date, but on March 20, 1929, when the Administration of Estates Act, 1925, was in force. The effect of the Administration of Estates Act has been to alter the class of persons who, in the case of intestacy, or partial intestacy, take as next of kin. It is suggested, however, that the effect of the Act of 1925 has also been to alter the law as it stood immediately before the Act, and, in effect, to restore the law as it applied to the case of a testator who died before September 1, 1830. It is argued that the effect of the Act is, accordingly, that I am now free to hold that the appointment of the widow as executrix gave her the whole of the testator's personal estate. I may parenthetically remark that, in the circumstances of this case I should have been by no means distressed if I had been able to hold that to be the result, because I suspect that if the testator had had proper advice, or his will been drawn by anybody who was skilled in the matter, he would have given his property to his wife. But, unless I can hold that the effect of the Act of 1925 has been to restore the law to the position in which it was before 1830, I cannot hold that this will operated to give the wife his personal estate.

The case is put for the widow thus. It is admitted that s. 46 of the Administration of Estates Act, 1925, applies where the dead man has left no will, and that s. 49 applies where the dead man has left a will disposing effectively of part of his property but not of the whole of his property. It is pointed out that by the Second Schedule the Executors Act, 1830, is repealed. It is suggested that in such a case as the present, where the dead man has left a will but has not disposed effectively of any part of his property, neither s. 46 nor s. 49 applies, and that accordingly the Executors Act, 1830, having been repealed, the law stands as it was before the enactment of the Executors Act, 1830, and that the executrix will take beneficially.

If this reasoning is sound it would seem that through what one may suppose is some error of draughtsmanship, and without any indication in the statute that that was the intention, the law has been put back very nearly a century. In my judgment, I am bound to hold that the effect of this will is, while appointing the widow executrix, to leave her under the obligation of distributing the property among the persons who are indicated as the persons to take under s. 46.

"Intestate" is defined in s. 55 and obviously covers the case of a man who has made no will, but the Act, by the definition section, adds this to the meaning of the word "intestate": "'Intestate' includes a person who leaves a will, but dies intestate as to some beneficial interest in his real or personal estate." The word "intestate" cannot possibly, in the latter part of that sentence, have the meaning "without leaving a will," which is its literal meaning, because the phrase is used in reference to a person who does leave a will. The phrase used means, in my view, a person who has not made an effective disposition of the beneficial interest in the whole of his property. If that be the right view, then, when a man has made only a partial disposition of the beneficial interest in his property, or has made no disposition at all of that beneficial interest, although he has made a will, his property must be dealt with in the manner indicated in s. 46, with the modification, where there has been a partial disposition, indicated in s. 49 of the Act. The result of that is that the law applicable to such a case as the present remains exactly the same as it was before this Act was enacted with the modification that the class of next of kin to take has been altered.

In answer it was suggested, on the widow's behalf, that an appointment of an executor is of itself an effective disposition of the beneficial interest; that it was so before 1830, and that, having regard to the fact that the Act of 1830 is repealed, it must be treated as being so now. The sound reply, in my judgment, is that it is not true that by appointing an executor as the law stood before 1830 a testator made an effective disposition of the beneficial interest in the whole of his property. He made no disposition at all of the beneficial interest in his property by appointing an executor. The executor having been appointed he, by virtue of his office, took the property, but he took the property, not by reason of any disposition by the testator of the beneficial interest, but by reason of his appointment as executor.

The result is that I hold that the enactment of the Administration of Estates Act, 1925, has not altered the law

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on the material point before me, and that the effect of the will is not to vest the deceased's personal property beneficially in his wife, but is to put her as executrix under the obligation of distributing the estate in accordance with s. 46 of the Administration of Estates Act, 1925.

Solicitors: *Langford, Borrowdale & Thain; Samuel Price & Sons.*

H. L. L.

CLAUSON J.
1936
May 19, 27.

In re BRACEY.

HULL *v.* JOHNS.

[1927. B. 1250.]

Administration—Executors continuing testator's business under power in will—Debts incurred—Administration order made—Interest on debts—Whether due and as from what date—R. S. C., Order LV., *rr.* 62, 63.

Where executors have carried on a business belonging to the testator after his death, under a power in his will, and, in an action for administration of the testator's estate, the debts incurred in so carrying on the business have been certified, those debts will be paid with interest as from the date of the certificate, before distribution to beneficiaries; but Order LV., rr. 62 and 63, under which interest is allowed to creditors of a deceased upon their debts as from the date of the order for administration, does not extend to creditors of his executors.

In re Frith [1902] 1 Ch. 342 and *In re Dietz* (1910) Ann. Pr. 1936, p. 1189 (Warrington J.) followed.

FURTHER CONSIDERATION.

The testator, Albert Ernest Bracey, by his will, dated November 21, 1924, appointed the plaintiff and the defendants Johns and Peers executors and trustees of his will, and gave them power to carry on his business of a boarding house proprietor if they should in their discretion think fit and to employ such of the testator's capital therein as might seem desirable to them. The testator died on August 25, 1925, and his will was duly proved by the executors on

November 26, 1925. His estate at his death comprised a lease of the Imperial Hotel, Great Yarmouth, and the goodwill of the business carried on by him thereon. The business was continued by the defendant Johns, who had been the testator's manager, but considerable sums had to be spent in redecoration and furniture for the hotel, and disputes arose between the trustees. In March, 1927, the plaintiff commenced this action, in which a receiver was appointed and an order made for general administration of the testator's estate in August, 1927.

By his certificate dated June 27, 1931, the Master certified that debts to the amount of 2023*l.* had been incurred by the executors in carrying on the testator's business. On July 5, 1933, on the action coming on for further consideration, Farwell J. made an order to carry on proceedings and for the sale of the testator's business, goodwill and effects, the receiver to continue to act as manager until sale.

It appeared that the debts were mainly incurred between the death of the testator in 1925 and April, 1927, in respect of goods supplied to and work done for the Imperial Hotel. The defendant Peers was himself a creditor for 162*l.* for goods supplied. The sale was not proceeded with, but the estate was wound up. The defendant F. J. Page was the residuary legatee under the testator's will. He was an infant at the time of the testator's death, and the business was continued mainly for his benefit. The original debts of the testator had long since been paid, with interest, and the only question raised on this further consideration was whether the executors' business creditors were entitled to receive interest on their debts, and if so as from what date. The defendant Peers claimed interest on his debt as from the date of the judgment.

J. A. Mackintosh for the plaintiff.

Fergus Morton K.C. and *Lloyd Williams* for the defendant Peers. This defendant is a creditor within the meaning of Order LV., r. 63, and entitled to interest on his debt as from the date of the judgment for administration. The note to this rule in the Annual Practice, p. 1189, refers to an unreported case of *In re Dietz* (1910) before Warrington J., who there held that the rule referred to creditors of the testator, but did not include creditors of executors carrying on the business of a testator after his death. It is submitted that this note is not supported by any authority. It is not supported by the note in the registrar's book, which has been examined.

Creditors of executors may be recognized as creditors under an administration decree, though not strictly creditors of the testator: *In re Bach* (1); see also *In re Frith.* (2) The creditors of the business are entitled to be paid out of the trust estate in priority to the creditors of the testator, by virtue of the trustees' right of indemnity.

Alternatively we ask for an order for payment of interest as from the dates when the debts were incurred, under s. 3 of the Law Reform (Miscellaneous Provisions) Act, 1934, under which the Court has power to award interest. The Master's certificate finds that a person is a creditor, and what the amount of his debt is. The Act, which came into force after the debt was incurred, allows interest on this.

Sir Gerald Hurst K.C. and *R. Turnbull* for the residuary legatee, F. J. Page. The Master's certificate is dated June 27, 1931. The only interest payable at that date was 4 per cent. interest on the debts of the testator. If the note of *In re Dietz* in the Annual Practice is correct, it covers the whole matter.

[CLAUSON J. It appears that all that Warrington J. decided was that r. 63 did not apply to executors' creditors.]

It is well established that executors' creditors have no right directly against the testator's estate, only against the executors personally. *In re Frith* (2); *Dowse* v. *Gorton.* (3) Executors cannot be entitled to an indemnity against their testator's estate for interest for which they are not liable. There is nothing to take the case out of the ordinary rule that no interest is due on ordinary contract debts.

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(1) [1892] W. N. 108.

(2) [1902] 1 Ch. 342.

(3) [1891] A. C. 190.

[CLAUSON J. Is not the Master's certificate equivalent to a judgment ?]

There is no form to be found in Seton on Judgments and Decrees allowing interest in such a case. The jurisdiction under s. 3 of the Law Reform (Miscellaneous Provisions) Act, 1934, only applies to an action for the recovery of a debt or damages, not to the further consideration of an administration action.

Winterbotham and *McQueen* for other parties attending.

Morton K.C. in reply. An executor may get more out of an estate by way of indemnity than he has actually paid. See Williams on Executors, 12th ed., vol. ii., p. 1222.

Cur. adv. vult.

May 27. CLAUSON J. The point which I have to determine is this : from the testator's death the executors, or subsequently the receiver in this action (the judgment in which was on August 3, 1927), carried on his business until it was sold recently under the order on first further consideration. In 1931 it was certified that certain debts were due to creditors of the executors, such debts having been incurred by the executors in duly carrying on the business. There is no question in the present case but that the executors are entitled to be indemnified against those debts, and that the creditors in question are entitled by virtue of the executors' right of indemnity to be paid the certified debts out of the funds in court. I am, however, now called upon to determine whether those creditors should be paid interest and, if so, from what date, on the certified debts. The estate is amply solvent and there is a substantial residue. The debts did not of themselves carry interest.

It is not in dispute that the Master's finding bound the executors and that if, immediately after the finding, a creditor whose debt had been thus duly found, had sued the executors he would have recovered, as of course, a judgment for the debt which would have carried 4 per cent. per annum interest from judgment. Nor is it disputed that if this had occurred

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the executors would be indemnified against any interest they might have to pay under the judgment. If, in order to avoid suffering such a judgment, the executors had advanced their own money to pay the debt they would have been treated by the Court as entitled not only to be indemnified against the debt, but also to be allowed interest at 4 per cent. per annum on the money advanced by them to pay the debt; see *Finch* v. *Pescott.* (1) Under these circumstances it would seem reasonable that the Court should treat the creditor as from the date of the certificate as in the same position as if he had, as at that date, not merely proved his claim so as to bind the executors, but also had obtained, what he could as a matter of routine have obtained, a judgment carrying interest at 4 per cent. per annum in his favour. The Court in discharging its functions as a court of equitable administration does not usually require those with whom it deals to go through mere idle forms, such as the obtaining of a formal judgment when the Master's certificate amounts to a binding decision. It is accordingly not surprising to find that in the only reported case to which I was referred on this part of the case—namely, *In re Frith* (2)—it would seem, though the report is not clear on the point, that Kekewich J., in precisely analogous circumstances to those with which I have to deal, allowed the executors' creditors interest at 4 per cent. per annum on their debts, as from the date of the certificate. I have obtained the record in that case, and I find that the judge ordered interest at 4 per cent. per annum as from the date of the certificate to be computed on the claimants' debt, and the other like debts previously certified, and ordered payment of the ultimate aggregate of those debts with that interest to be paid out of the estate. Curiously enough the order speaks of the debts as the testator's debts, though they were in fact debts of the executors; but I am satisfied on looking at the record and at the registrar's book that it was a case in which it was recognized that the proper practice was for the executors' debts properly incurred in carrying on the business to be paid out of the funds in court, with interest at 4 per cent. per annum from the date of the certificate finding them due. That practice seems to be entirely in accordance with principle and I propose to follow it and to direct the like payment in the present case.

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(1) (1874) L. R. 17 Eq. 554.

(2) [1902] 1 Ch. 342.

It was, however, argued that the debts in question ought to be paid with interest as from the administration judgment, and not as from the date of the certificate. It is not easy to see on what principle that should be done. The testator's own debts carry interest as from the judgment, in the appropriate circumstances, on the principle that an administration order ought to have a similar operation as regards interest on the testator's debts to a judgment, since it precludes the creditors from obtaining judgments of their own. This principle is the basis of Order LV., rr. 62, 63, which reproduce the rules which existed before the Judicature Acts and which crystallized the practice as regards debts of the testator. It is, however, as I venture to think reasonably plain that these rules are directed to the case of the debts of the testator, and do not cover the case of debts incurred by the executors, though the latter class of debts may become payable, as in the present case, out of the estate. The point has, however, been decided by Warrington J. in *In re Dietz* (1905, D. 273), on November 16, 1910. I have referred to the record in that case, and to the registrar's note of the hearing, as well as to the Master's file, and it appears quite clearly that Warrington J. decided that r. 63 has no application to the case of debts incurred by the executors in carrying on their testator's business. The estate in that case was deficient to meet even those debts, accordingly the question whether or in what event such debts ought to carry interest as from the date of the certificate did not arise. There is nothing in the papers in that case to suggest that any doubt was thrown on the propriety, in the case of a solvent estate, of following the practice which Kekewich J. had adopted in *In re Frith.* (1)

I accordingly decide that the debts of the executors certified in the present case are to be treated as carrying

(1) [1902] 1 Ch. 342.

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interest as from the date of the certificate at 4 per cent. per annum.

Solicitors: *Botterell & Roche, for Chamberlin, Talbot & Bracey, Great Yarmouth; Smith & Hudson, for Wiltshire, Sons & Jordan, Great Yarmouth; Peacock & Goddard, for Hill & Perks, Norwich; The Official Solicitor.*

H. L. L.

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In re CROCKER and *In re* TAXATION OF COSTS.

[1936. G. 636.]

Practice—Production of documents—Motor-car accident—Action for damages by third party—Defence conducted by insurance company—Judgment for plaintiff on admissions of negligence—Defendant's right to production of documents in solicitors' custody or control—Solicitor and client—Solicitors Act, 1932 (22 *&* 23 *Geo.* 5, *c.* 37), *s.* 64—*R. S. C., Order* L., *r.* 3.

Where an action for damages for negligence arising out of an accident is conducted on the defendant's behalf by his insurance company, and solicitors are nominated by the company, under a clause in the policy to that effect, the company only act as the defendant's agents, and the solicitors are throughout solicitors for the defendant. The solicitors are therefore bound, if requested so to do, to produce to their client all documents relating to the action in their possession, custody or control, either during the course of the action or after its conclusion, and the insurance company has no right to object to the production of the documents.

The Court will, if necessary, make an order for production of the documents.

SUMMONS.

The summons was taken out by W. Groom, the second defendant in an action of *Groom* v. *Tear Brothers and Groom*, asking that the solicitors who had acted for him in that action, Messrs. William Charles Crocker, should (1.) deliver up to him, or (2.) produce for his inspection, all the documents relating to that action in their possession, custody or control.

The applicant was insured against motor accidents under a policy in the usual form issued by the National Farmers Union Mutual Insurance Society, Ld. (hereinafter called "the insurance company"). On August 11, 1934, he was driving his car, in which his brother A. Groom was a passenger, when he was involved in a collision with a motor lorry belonging to the first defendants, Tear Brothers, causing damage to his car, some injury to himself and serious injury to his passenger. The driver of the motor lorry was prosecuted and fined for dangerous driving causing the accident, and the applicant sued Tear Brothers and recovered 100*l.* damages for negligence. Afterwards the passenger, A. Groom, brought the action first above mentioned, alleging negligence by the drivers of both vehicles. This action was conducted for the defendants entirely by their respective insurance companies, in accordance with clauses in the policies, the respondents being selected as solicitors by the applicant's insurance company. Tear Brothers delivered a defence denying negligence and the respondents delivered a defence on behalf of the applicant admitting negligence. The action was thereupon discontinued against Tear Brothers and judgment was given for the plaintiff against the applicant for 924*l.*

The applicant, in an affidavit, said that on being served with the writ in the second action he took it to the local agent of the insurance company and said how annoyed he was at being made a party as, he said, it was quite clear that Tear Brothers were alone to blame for the collision. He instructed the agent to deal with the matter on his behalf in the usual way. He heard nothing more about it until his own solicitor in the country informed him that he had been given a copy of the defence. In that defence, delivered by the respondents as his solicitors, an admission of negligence by him was made. He had never given any authority to his insurance company to admit any negligence by him, and did not understand how they could have done it. The applicant's country solicitor said that he would inform the insurance company. He (the applicant) heard nothing more until on or about November 3, 1935, when he read in the local newspaper that the action had been tried and judgment given against him for 924*l.* damages and costs. The applicant said that the respondents appeared on the record as his solicitors, and therefore the relation of solicitor and client existed between them. In the circumstances he desired to see all the papers in the action in order to ascertain what had happened, and instructed his present solicitors to write and ask that the papers be handed over to them. After an interval the respondents wrote saying that they did not admit that the applicant had any legal right to demand delivery or inspection of the documents in the action, though they were prepared, as an act of grace, to show certain correspondence and the pleadings, but were not prepared to go any further.

Fergus Morton K.C. and *Gerald Gardiner* for the applicant. The respondents were solicitors for the applicant as defendant in the action of *Groom* v. *Tear Brothers and Groom*, and the applicant is entitled to an order for production and inspection by him of all the relevant documents in that action. The applicant does not now ask for delivery up of those documents to him, but he does demand liberty to inspect them, which the respondents refuse on the ground that the documents belong to the applicant's insurance company.

[They referred to the Solicitors Act, 1932, ss. 64 and 66; Order 55, r. 2; Order 50, r. 3; *Adams* v. *London Improved Motor Coach Builders, Ld.* (1); *Walsh* v. *Julius White* (2), and Cordery on Solicitors, 3rd ed., at p. 592.]

H. D. Samuels K.C. and *J. G. Strangman.* In dealing with an application of this kind the Court must be careful not to interfere with the rights of other parties. The insurance company may well object to the handing over of these documents.

[CLAUSON J. The company were not parties to the action; the respondents' only right in the action, though selected by the insurance company, was to appear as solicitors for the present applicant.]

(1) [1921] 1 K. B. 495.

(2) Unreported.

They were acting in a dual capacity. The order if made should not extend to papers of any date after the conclusion of the action.

The applicant has contracted with the company to allow them absolute control of any litigation or proceedings in relation to the insured. That includes the conduct and control of all documents and the right to withhold any documents the company may be advised to withhold. They are, in fact, the insurance company's documents. There is no authority to entertain such an application after the litigation has closed. See *Ex parte Cobeldick* (1) and *In re Hawkes* (2), per Lindley M.R. The respondents do not claim any lien on the documents.

Where there is a claim by two parties to documents, they should not be ordered to be produced or delivered to one party without the consent of the other. It would be very difficult to say which documents belong to the applicant and which to the insurance company. The production is not required to assist in the conduct of the action, for that is over. They may be wanted, however, as materials on which to found an action by the applicant against the insurance company.

No reply was called for.

Clauson J. The applicant, Mr. William Groom, was driving a motor-car in which there was a passenger, his brother, Mr. Aubrey Groom. There was a collision between the motor-car which Mr. William Groom was driving and a motor vehicle which was driven by or on behalf of a firm named Tear Brothers. In those circumstances the passenger, Mr. Aubrey Groom, saw fit to bring an action against Mr. William Groom and against Tear Brothers claiming relief arising, I suppose, out of injuries which he had sustained. Mr. Groom, the present applicant, the defendant to that action, retained as his solicitors the firm of solicitors with which I am concerned, and in the matter of whom this application is made. They acted as his solicitors in that action. I am told that that action has now run its course.

(1) (1883) 12 Q. B. D. 149.

(2) [1898] 2 Ch. 1, 6, 7.

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I do not know the details of it, but I suppose there was a judgment. Mr. Groom, the applicant, for reasons of his own, is desirous of having access to the papers relating to the action which are in the custody, possession or power of the solicitors. That there are such papers is not questioned. Mr. Groom has taken out the present summons asking, in the first instance, for an order that all documents in their possession belonging to him be delivered over to him. That part of the summons he is not pressing. The part of the summons which he is pressing is the second paragraph, which asks for an order that the solicitors do produce " all books, documents, papers and writings in their custody, possession or power relating to the action entitled *Groom* v. *Tear Brothers and Groom*, and that the applicant, his solicitors and agents be at liberty to inspect and peruse the documents so produced and to make notes of their contents, and be entitled to be supplied with copies." The solicitors, whether or not they have a lien, do not wish to raise any point in respect of any lien which they might have, and accordingly the position is the same as if they had no lien at all. In these circumstances, on the facts as I have stated them up to the present, it would seem obvious that the applicant is entitled to the relief which he is now asking. He has employed a solicitor in an action, the solicitor has acted for him in the action, there are papers in the custody of the solicitor relating to the action, and the client, of course, is entitled to see them and to take copies. So far the matter seems simple.

I now come to the circumstances which it is suggested raise a difficulty in the way of my making the order for which the applicant asks. It is not, I think, disputed now, though it was questioned at one time, that there is full jurisdiction in the Court to make such an order, either under its inherent jurisdiction or possibly under certain provisions in the Solicitors Act, 1932. It is suggested, however, that the Court, in its discretion, ought not to make such an order in view of the following circumstances. The applicant, Mr. Groom, was insured under a policy against the usual third party risks, a policy issued by an insurance society. The policy is in the usual form. Among other things, the policy contains this condition : " The insured shall not incur any expense whether in respect of litigation or otherwise or make any payment, settlement, arrangement or admission of liability in respect of any death, injury, loss or damage for which the society may be liable under this policy without the written authority of the society, except as provided for herein, but the society shall if and so long as it so desires have absolute conduct and control of all or any proceedings against the insured including arbitration and negotiation, and shall be entitled to use the name of the insured to enforce for the benefit of the society any order made for costs or otherwise or to make or defend any claim for indemnity or damage against third parties."

It was in accordance with that condition that the selection of the solicitors to act for the applicant in the action was made. The selection was admittedly made by the insurance company, and they employed solicitors who, I presume, though I do not know that this is material, are frequently employed in such matters by the insurance society. In virtue of that condition and under the authority which the insured accordingly gave to the insurance company to select the solicitor, and to have the absolute conduct and control of the proceedings, the action was carried on. I wish to emphasize this, that throughout—and this, of course, is not in dispute—the solicitors, though selected by the insurance company, were in all matters concerned with the action solicitors for the present applicant who was a party to the action (the insurance company, I may remark parenthetically, not being parties to the action), and it is in respect of the duties which the solicitors owe to the applicant as being solicitors for him that the right of the applicant arises to have access to all the documents concerned with the matter in which the solicitors were acting as solicitors for him. It is suggested that the provision that the insurance company were to have absolute conduct and control of all the proceedings has this result, that the insurance company are, on the true construction of that condition, entitled to direct the solicitors not to give effect to what are, prima facie, the applicant's rights—namely, that he should see these documents. As a matter of construction I do not agree with that suggestion. It does not seem to me that anything in the words of the condition of the policy leads to any such result. I agree that by this policy the insurance company are to have the conduct and control of the proceedings, but I cannot agree that those words are to be interpreted as meaning that the insurance company are authorized by the insured to interfere with the ordinary rights to see the papers which a client has against a solicitor who is acting for him.

The next point made is this. It is said that the Court in the exercise of its discretion ought not to make the order, and for this reason, that the insurance company object to the solicitors showing these documents to the client. I confess that if the applicant in this case had pressed, as he does not press, for the order asked for in the first part of the summons—namely, delivery over of all documents belonging to him in the custody of the respondents—there might have been a difficulty about the matter, and the Court might have hesitated to make such an order as that in the absence of the insurance company. But that is not what is now asked. What is asked is that the client should be allowed to see the documents which have come into being with regard to the matter in which he employed the solicitors, and I cannot see that the insurance company can have any right to interfere with that. I appreciate that, having regard to the obligations which the insurance company have undertaken to the present applicant, they may have an interest in the matter, and it may be that, if any question arises with regard to the rights under the policy as between themselves and the applicant, they may desire to have access to those documents which the applicant desires to see. That might be a very good reason for maintaining the present custody of these documents in the hands of the solicitors. But why that should prevent the applicant seeing the documents I must confess I cannot understand. However, that is the submission which has been put forward; it is a submission to which I do not see my way to give effect. I do not see what right I have to interfere with what seems to me to be a plain right of the client against his solicitor.

In those circumstances I propose to order that the respondents do at all seasonable times on reasonable notice produce at their office all books, documents, papers and writings in their custody, possession or power relating to the action entitled *Groom* v. *Tear Brothers and Groom*, and that the applicant, his solicitors and agents be at liberty to inspect and peruse the documents so produced, and to make notes of their contents and be entitled to be supplied with copies, such production to be, if so required by the applicant, on oath. The effect of that will be this, that the solicitors will in the first instance take the responsibility of making up their minds what books, documents, papers and notes they have in their custody which relate to the action, and it may be that there are some documents in their custody which they think do not relate to the action, and which the applicant may think do so relate. If that is so, and if the applicant has any reason to suppose the affidavit to be insufficient, he can ask for an order for a further and better affidavit. If there is any question whether any particular document does or does not fall within the terms of the order, the machinery of the Court can be brought into operation for the purpose of dealing with the question.

Solicitors: *Metcalfe, Copeman & Pettefar; Linklaters & Paines.*

H. L. L.

CLAUSON
J.
1936
May 28, 29.

Disapproved. In re Harrison's Will Trusts. [1949] Ch. 678

In re WARD'S WILL TRUSTS.

RINGLAND *v.* WARD.

[1935. W. 3666.]

Company—Profits arising from realization of capital assets—Resolution to distribute on capital footing—Settled legacy of shares in company —Whether capital or income in hands of trustees.

A testator, who died in 1928 and whose estate largely consisted of shares in a steamship company, by his will directed that they should not be sold during the continuance of the trusts upon which he settled them, and gave the dividends, interest, and annual income thereof to his widow during her life or until she should remarry, and subject thereto to his children during their lives and then to their issue. The company adopted an article enabling it to distribute surplus moneys representing proceeds of sales of ships and investments among the shareholders on the footing that the same should be received as capital. In 1934 it distributed 819,000*l.* among the shareholders in exercise of this power, of which the trustees of the will received 16,000*l.* :—

Held, that on the true construction of the will and in the events which had happened the 16,000*l.* must be treated as an accretion to the capital of the trust fund.

Hill v. *Permanent Trustee Company of New South Wales* [1930] A. C. 720 distinguished.

ORIGINATING SUMMONS.

The testator, Frank Ward, by his will dated July 31, 1925, after appointing the plaintiffs and the defendants Caroline Theodora Ward and Robert Alexander Ward executors and trustees, devised and bequeathed unto them all the rest and residue of his estate upon trusts for conversion and investment, subject to the provisions thereinafter contained with respect to his shares in the Charente Steamship Company, Ld. As to these shares he directed that the following provisions should have effect: (*a*) the shares were to be held by his trustees and not to be sold or disposed of during the continuance of the trusts declared in respect thereof, (*b*) the shares were to be held upon trust to pay the dividends, interest, and annual income to arise therefrom to the testator's wife, the defendant Caroline Theodora Ward during her life or until she should marry again, and (*c*) from and after the decease or remarriage of his said wife to pay and divide the dividends, interest, and annual income between his four children named during their lives, and (*d*) subject thereto upon trust for the issue of his four children per stirpes at twenty-one or marriage.

The testator died on May 4, 1928, without having altered his will, which was duly proved on July 31, 1928. He left his wife and his said four children surviving him. At the date of the summons the testator's widow had not remarried. All his children were married and two of them had issue.

At the date of his death the testator held ten shares of 1000*l.* each in the Charente Steamship Company, Ld., which were valued for probate at 5800*l.* per share. Since the testator's death dividends at rates varying from 32 to 75 per cent. per annum had been paid on these shares. The company was incorporated on December 16, 1884, and had a capital of 512,000*l.*, divided into 512 shares of 1000*l.* each. The objects of the company were mainly to take over and work a number of steamers owned by the subscribers as private shipowners.

In 1919 the company adopted a new article, article 67A, which was as follows: "The company in general meeting may from time to time and at any time resolve that any surplus moneys in the hands of the company representing the moneys received or recovered in respect of or arising from the realisation of any capital assets of the company or any investments representing the same instead of being applied in the purchase of other capital assets or for other capital purposes be distributed amongst the members on the footing that they receive the same as capital and in the shares and proportions in which they would have been entitled to receive the same if it had been distributed by way of dividend. For the purposes of this provision surplus money or investments means money or investments in the hands of the company over and above a sufficiency of other assets to answer in full the whole of the liabilities and paid up share capital of the company for the time being."

At an extraordinary general meeting of the company held on September 12, 1934, it was resolved that pursuant to clause 67A of the articles of association, the sum of 819,200*l.* part of the surplus money in the hands of the company representing moneys received or recovered in respect of or arising from the realization of certain capital assets of the company then standing to the credit of "Capital Reserve Account" instead of being applied in the purchase of other capital assets or for other capital purposes be distributed amongst the members, on the footing that they received the same as capital and in proportion to the shares held by them respectively in the company and that the managers be and they were thereby authorized to distribute the same accordingly.

On September 13, 1934, the sum of 16,000*l.* was paid by the company to the bankers of the trustees of the will, in accordance with this resolution. Doubts having arisen as to whether this money was capital or income, this summons was taken out by the plaintiffs to have it determined whether upon the true construction of the said will and in the events which had happened the said sum of 16,000*l.* received by the trustees from the company should be treated as income to which the defendant Caroline Theodora Ward was absolutely entitled, or whether the same or any part thereof should be treated as an accretion to the capital of the shares settled by the will, or how otherwise the same should be dealt with. There was evidence by the secretary of the company that the business of the company was to operate ships and not to deal in them and that the moneys distributed on September 13, 1934, were wholly out of capital profits derived partly from a large cash surplus arising from the realization of certain ships, and partly from profits realized on the sale of securities belonging to the company.

C. Montgomery White for the plaintiffs.

Wilfrid Hunt for the testator's widow, Mrs. Caroline Ward. The payment must be treated as income, although described as capital. The company cannot make any cash payments of capital, where it is still a going concern, except by taking the proper steps to reduce its capital. Any excess of assets over the nominal capital represents an accumulation of profits, and must be distributed as income.

Bouch v. *Sproule* (1); *In re Bates* (2); *Hill* v. *Permanent Trustee Company of New South Wales.* (3)

Here there is no power in the trust instrument to capitalize profits.

Gerald Upjohn for the defendants Mrs. Florence Ringland and Robert A. Ward, children of the testator. The manner in which the company treats any particular distribution is binding on the shareholders: see *Bouch* v. *Sproule* (4) and the observations on that case in *Hill's* case. (3) For the secretary of the company to say, as he did in *In re Bates* (2), "this is capital and not income," does not bind the company: see *Irving* v. *Houston* (5), where the House of Lords held that a bonus paid by a bank to a shareholder was capital and not income.

In order to distribute capital, the ordinary company can either pay it away in the form of a cash dividend or it can increase its capital and pay it out of the assets. If there are surplus assets, of the nature of capital, there is no authority to suggest that such assets cannot be distributed among shareholders as capital. It will not reduce or affect the stability of the real capital of the company. To make the distribution one of capital is obviously entirely in accord with the testator's intention in this case.

The only sound principle of dealing with the question is best expressed by Fry L.J. in *Bouch* v. *Sproule.* (6)

A. C. Nesbitt for the defendants, Mrs. Ormsby and Edward Noel Ward, children of the testator. This is a new case, because in no previous case has there been both an absence of power to increase capital and the presence in the constitution of the company of a special power of capitalization of surplus assets. It is admitted that a company must do some formal overt act in order effectually to capitalize profits as distinct from a mere expression of intention by its executive, and if a company has power to increase its capital, this overt act naturally takes the form of an issue of further capital. But if it has no such power, the overt act may take any other form open to the company by its constitution : here article 67A is valid in law, however unusual, and expressly authorizes what has been done. The earlier cases, such as *Irving* v. *Houston* (1) and *Ward* v. *Combe* (2), proceed upon this principle, and these cases are still good law in circumstances where they are applicable : *Hill's* case. (3)

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(1) (1887) 12 App. Cas. 385.
(2) [1928] Ch. 682.
(3) [1930] A. C. 720.
(4) 12 App. Cas. 393.
(5) (1803) 4 Paton Sc. App. 521; 2 Sc. Rev. Rep. 164.
(6) In C. A. sub nom. *In re Bouch; Sproule* v. *Bouch* (1885) 29 Ch. D. 635, 653.

[CLAUSON J. referred to the judgment of Lord Sumner in *Inland Revenue Commissioners* v. *Blott.* (4)]

Hon. Denys Buckley for F. W. Ringland and other infant defendants.

Wilfrid Hunt in reply. The object of the article is to inform the shareholders that whatever moneys may be distributed under it they will not be subject to income tax in the hands of the recipients. The money is only received as capital in the sense that it need not be included in income tax returns. The mere fact that it is not subject to surtax does not show that the tenant for life is not entitled to receive it. See *Neumann* v. *Inland Revenue Commissioners* (5) and *Gimson* v. *Inland Revenue Commissioners.* (6)

In a liquidation half the assets may be undistributed profits, but they are treated as and become capital for the purposes of distribution. The converse to this applies where the company is a going concern.

Capitalization can only be effected by the company, and not by the trustees. In *Hill's* case (3) there was no power in the constitution of the company to say that any distribution should be a capital distribution.

CLAUSON J. The testator, by his will made in 1925, holding at that time certain shares in the Charente Steamship

(1) (1803) 4 Paton Sc. App. 521 ; 2 Sc. Rev. Rep. 164.

(2) (1836) 7 Sim. 634.

(3) [1930] A. C. 720.

(4) [1921] 2 A. C. 171, 218.

(5) [1934] A. C. 215, 228.

(6) [1930] 2 K. B. 246.

Company, Ld., made this disposition: "And with respect to the shares in the Charente Steamship Company, Ld., held by me I direct that the following provisions shall have effect (that is to say): (*a*) The said shares are to be held by my trustees and are not to be sold or disposed of during the continuance of the trusts hereby declared in respect thereof: (*b*) The said shares are to be held by my trustees upon trust to pay the dividends interest and annual income to arise therefrom to my said wife Caroline Theodora Ward for and during the term of her natural life or until she shall marry again." There is a subsequent life interest to the children and a subsequent trust for the issue of those children. The testator died in 1928.

Those shares were shares in a company the constitution of which, having regard to certain special resolutions which had been adopted in 1919, was as follows: Its share capital was 512,000*l.*, and by its articles the company had no power to increase its capital, but of course it could, by taking the proper steps in accordance with the Companies Acts, have taken the powers which would have enabled it to increase its capital. But at the time the testator made his will and, indeed, at the time of his death, and even now, the constitution of the company did not and does not enable its capital to be increased. The managers had a power to declare dividends which would enable them to divide any profits which were available for dividend.

The company, however, retained to itself a power exercisable in general meeting but not entrusted to the managers, which was as follows. It is contained in article 67A and was adopted by a special resolution in 1919. [His Lordship read article 67A and continued:] According to the constitution of the company, if it had such assets as are described in that article, it could determine that those assets should not be left in the hands of the managers for them to declare dividends thereout, but that there should be a distribution of such assets among the members, who should receive the same as capital.

At a meeting of the company on September 12, 1934, the following resolution was passed: "Resolved: That pursuant to clause 67A of the articles of association of the company the sum of 819,200*l.*, part of the surplus money in the hands of the company representing moneys received or recovered in respect of or arising from the realization of certain capital assets of the company at present standing to the credit of capital reserve account, instead of being applied to the purchase of other capital assets or for other capital purposes, be distributed amongst the members, on the footing that they receive the same as capital and in proportion to the shares held by them respectively in the company and that the managers be and that they are hereby authorized and directed to distribute the same accordingly." In other words, the managers were not to use this money to distribute it by way of dividends under their powers under article 63, but they were, on behalf of the company, to deal with it as the company was empowered by article 67A in general meeting to do—namely, to pay it over to the shareholders, who were to receive the same as capital. The trustees of this will in respect of the shares held by them on the trusts of the will received under this resolution the sum of 16,000*l.* The question is whether they ought to treat the 16,000*l.* as being capital of their trust fund, or whether they have authority, under the terms of the will, to pay over the 16,000*l.* to the testator's widow in respect of her life interest.

The will directs the shares to be "held by my trustees upon trust to pay the dividends interest and annual income to arise therefrom" to the widow. Can the phrase "dividends interest and annual income to arise therefrom" be treated as covering this sum received in the circumstances which I have stated? It is not a dividend in the ordinary sense, it certainly does not come within the term "interest" and it does not seem aptly described as annual income. It appears to me that the trustees would be committing a breach of trust if they paid over the 16,000*l.* to the widow under the authority given by those words. The testator has by the words which I have read marked out the interest of the tenant for life. He was quite free to use a phrase which would have given to the tenant for life any distribution made by the company under the powers which the company had under article 67A of its constitution, but he did not use such a phrase. He must be taken to have known that there might be a distribution of what is normally called a dividend, or that there might be a distribution under this special article of moneys which, according to the constitution of the company, were to be paid to the shareholders on the footing that they should receive the same as capital. I cannot think that he has indicated by the words which he has used that a payment of that character, which he must have known as a shareholder of the company might possibly be made by the company, was to be paid to the tenant for life.

In this connection I may refer to a passage in Lord Sumner's judgment in *Inland Revenue Commissioners* v. *Blott.* (1) Lord Sumner was dealing with the decision in *Bouch* v. *Sproule* (2), and he pointed out that the question in that case (as in the case now before me) was how the settlement operated as between beneficiaries. His Lordship said: "In any literal sense of the word intention had nothing to do with the matter. The testator had none, for he never gave the question a thought; the trustee had none, for his duty was to leave the law to settle the incidence of the benefits. He had no right by electing to take the shares to benefit the tenant for life to the prejudice of the remaindermen. The directors and the shareholders were strangers to the settlement and heard and knew nothing about it; the company, in so far as intention is a mental act, was incapable of having any intention at all. The tenant for life and the remainderman had no intention except to get the most out of what had been done; in the doing of it they had and could have had no hand at all. The intention which the final decision assumed was one of those so-called intentions which the law imputes; it is the legal construction put on something done in fact. The testator had disposed of shares with regard to which the company could take a certain course. He was not affected by the Companies Acts but could determine for himself what should be capital and what income

(1) [1921] 2 A. C. 171, 218.

(2) 12 App. Cas. 385.

to the objects of his bounty or could leave it to be determined by others, including the company, just as he chose. The law deemed him to intend his disposition to apply according to whatever course in fact was taken, and by means of this assumption of his intention an effect was given to his disposition which was consistent with the fact that the parties derived their rights solely from his bounty, although in circumstances in which, as a matter of fact, he had made no conscious disposition at all."

Lord Sumner explained that in that case the testator had not expressed any intention as regards the destination of the payment there in question but that he had left it to the company to determine whether any payment to be made should be of a capital nature or an income nature. In the present case every precaution has been taken to make it quite clear that the payment which is in issue here was being made by the company as a capital payment and not as an ordinary income payment, and was made under an express power which was part of the constitution of the company, while the testator himself held the shares.

It was, I think, conceded by counsel for the tenant for life that before the year 1930 there was no case in the books which laid down any principle which would be inconsistent with the decision which I have expressed in this judgment, but he suggested that there was to be found some principle laid down in a Privy Council decision of *Hill* v. *Permanent Trustee Company of New South Wales* (1), which precluded me from arriving at the decision which I have expressed. I have studied that case with some care and, so far as I can see, the points which are material to the present case—namely, whether or not there is any objection to be made to the validity of an express provision such as the one in this case enabling the company to make a payment by way of capital distribution, and as to the operation of such a provision—were not before the Court in that case. The constitution of the company with which their Lordships were dealing contained nothing corresponding with article

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(1) [1930] A. C. 720.

67A, and, so far as I can see, no such points as I have before me are covered by anything which was decided in that case.

Accordingly, I decide that on the true construction of the will and in the events which have happened, the 16,000*l.* mentioned in the summons must be treated as an accretion to the capital of the fund in the hands of the trustees of the will.

Solicitors: *Boxall & Boxall, for Edwin Boxall & Kempe, Brighton.*

H. L. L.

In re SPOLLON AND LONG'S CONTRACT.

[1936. S. 290.]

LUXMOORE J.
1936
April 24, 27; *May* 28.

Vendor and Purchaser—Sale of land—Open contract—Alteration in deed presumed to have been made before execution—Document of title as altered insufficiently stamped—Statutory declaration to contradict deed—Whether purchaser can be compelled to accept.

An alteration in a deed is presumed to have been made before execution.

Where a vendor is selling land under an open contract, he cannot compel the purchaser to accept a statutory declaration as sufficient evidence to contradict statements appearing in the documents of title, such as the consideration stated in a deed which shows prima facie that the deed is insufficiently stamped.

VENDOR AND PURCHASER SUMMONS.

This was a summons taken out under the Law of Property Act, 1925, ss. 49 and 203, sub-s. 5, by the vendor under an open contract dated September 13, 1935, for the sale of certain leasehold property, for a declaration that the requisitions and objections of the purchaser in respect of the property had been sufficiently answered and that a good title to the said property had been shown in accordance with the contract.

On September 13, 1935, the applicant Sidney Spollon agreed to sell to the respondent Thomas Long under an open contract certain leasehold property at Birmingham, No. 7, Chain

Walk, Lozells, for the unexpired portion of a term of sixty-eight years from June 24, 1899, at a ground rent of 9*l.* 9*s.* per annum. The purchase price was 190*l.* An abstract was delivered and on October 12, 1935, the purchaser's solicitor sent in his requisitions on title. Requisition 1 was: "According to the abstract the stamp on the assignment of July 2 1912 is 2/6. Assuming the abstract is correctly marked, this deed would appear to be insufficiently stamped as the consideration is 75*l.* 12*s.* 6*d.* Any rectification necessary must be done prior to completion." The amount of the consideration as stated in the assignment appeared to have been altered to 75*l.* 12*s.* 6*d.* On October 24, 1935, the vendor's solicitors wrote to the purchaser's solicitor enclosing a copy of a letter from another firm of solicitors who had acted for the assignors under the assignment of July 2, 1912. The copy was of a letter dated October 19, 1935, from a Mr. Bernard Green, a partner in this firm. The letter stated that from the evidence in the possession of his firm (which evidence was specified in the letter) the consideration paid for the assignment of July 2, 1912, was 22*l.* 12*s.* 6*d.* and not 75*l.* 12*s.* 6*d.* The letter contained this statement: "The deed was evidently engrossed by the law-stationer and no material alteration was made in it except (if I remember rightly) that a superfluous word was struck out and initialled by me. It is I think obvious that if I initialled a minor alteration of this kind, a fortiori I should have initialled a very material alteration in the amount of the purchase money. I hope this will enable you to satisfy the purchaser's solicitors."

On October 29, 1935, the purchaser's solicitor wrote that his client was not prepared to proceed with the matter and to accept a title which was palpably defective, and on October 31 he wrote: "I am not prepared to advise my client to accept a title involving the acceptance of a deed which is either incorrectly stamped or which has since execution been altered."

On November 7, 1935, the vendor's solicitors wrote to the purchaser's solicitor: "Now it is obvious that the deed has, subsequent to the completion of the transaction, been altered, by whom, and for what purpose, we cannot say, and we have no means of finding out. This alteration does not affect or vitiate the title. A good and marketable title has been shown in our client, and even if we could find out why the deed has been altered, it would not make any difference as the legal estate is in our client. If after this explanation you still persist in your objection, we shall take out a Vendor and Purchaser summons to decide the point. In the event of a summons being issued we shall be glad if you will accept service on behalf of your client."

On December 13, 1935, the vendor's solicitors inquired whether the purchaser would go on with the matter if Mr. Bernard Green made a statutory declaration in support of the facts set out in his letter of October 19, 1935. To this the purchaser's solicitor replied on December 16, 1935, that on receipt of a statutory declaration he would be prepared to consider the position further. Mr. Green was willing to make a statutory declaration, and a draft declaration was sent to the purchaser's solicitor and as a result the purchaser's solicitor wrote to the vendor's solicitors on January 16, 1936, asking whether it would facilitate matters if he saw Mr. Green and endeavoured to agree a form of statutory declaration. He added: "If you think this desirable, I have no objection, but of course I shall expect your client to pay my costs for so doing." The vendor's solicitors replied on January 17, 1936, refusing to pay any costs.

This summons was accordingly taken out, as above stated, for a declaration, first, that the requisitions and objections of the purchaser had been sufficiently answered, and secondly, for a declaration that a good title to the property had been shown in accordance with the contract. It also asked that the purchaser should be ordered to pay the costs of the application.

G. P. Slade for the applicant. A subsequent alteration in a deed like this will not vitiate it: see Norton on Deeds, 2nd ed., p. 36, and the case of *Davidson* v. *Cooper* (1) for the remarks

(1) (1843) 11 M. & W. 778, 800.

of Lord Abinger in the course of his judgment. If this alteration does make a defect in the vendor's title, it is not one that the purchaser can insist on and enable him to repudiate the contract. It cannot affect the estate passing.

[LUXMOORE J. I do not think that you can force a purchaser to accept a statutory declaration as to title on an open contract: this would compel him on any subsequent sale to impose special conditions.]

No direct authority has been found on this particular point, but see Williams on Vendor and Purchaser, 3rd ed., pp. 120, 127, 128, and compare Dart on Vendors and Purchasers, 8th ed., p. 329: see also *Hobson* v. *Bell.* (1)

W. G. H. Cook for the respondent. The applicant has not shown a good title under the contract. If the deed has been altered, it should be put right. The mistake can be rectified. [He referred to *In re Marsh and Earl Granville.* (2)] It is submitted that there is no general rule that a vendor in a case like the one now before the Court can compel a purchaser to accept a statutory declaration.

The case was adjourned for further argument and research.

May 28. *G. P. Slade* for the applicant. No direct authority can even now be found regarding the question of the sufficiency of a statutory declaration. It has been held that if satisfactory secondary evidence can be furnished in similar cases by a vendor, the purchaser can be compelled to take it: see *In re Halifax Commercial Banking Co. and Wood.* (3) It is submitted here that if this alteration in the deed was made after execution there is no outstanding defect of title.

Fergus Morton K.C. and *W. G. H. Cook* for the respondent. This title cannot be forced on the purchaser; in these circumstances no one would take a statutory declaration willingly. The requisitions have not been satisfactorily answered. The insufficient stamping of the deed mentioned in requisition 1 creates a defect. The purchaser does not get a marketable title to which he is entitled under an open contract. It might be he would in the future have to prove

(1) (1839) 2 Beav. 17.

(2) (1883) 24 Ch. D. 11.

(3) (1898) 79 L. T. 536.

his own title by legal proceedings and would have to pay a penalty if the deed was required as evidence. This particular deed is a necessary link in the chain of evidence on title. The questions should be answered in the negative.

G. P. Slade in reply.

Luxmoore J. [stated the facts and after referring to the letter dated November 7, 1935, continued :] In my view the contention set out in that letter is incorrect. The assignment of July 2, 1912, has been produced to me. It is I think plain that there is an alteration in the consideration. In such a state of affairs there is, in the absence of any evidence to the contrary, a presumption that the alteration was made before execution. If any authority is needed for it, I refer to the case of *Doe d. Tatum* v. *Catomore.* (1) In that case the deed on which the plaintiff's title depended when produced appeared to have been interlined and erased in parts. Objection was made that the deed was void unless the lessor of the plaintiff gave evidence to show when the alterations were made. It had been left to the jury to say whether the alterations were made before the execution of the deed, and it was found by the jury that they had been so made. In moving for a new trial it was contended that the question ought not to have been left to the jury without some evidence besides the deeds ; and Lord Campbell (2) referring to Coke on Littleton said : "In Co. Lit., 225 b, it is said that, 'of ancient time if the deed appeared to be rased or interlined in places material, the judges adjudged upon their view, the deed to be void. But of latter time the judges have left that to the jurors to try whether the rasing or interlining were before the delivery.' In a note upon this passage in . . . . Coke upon Littleton, it is laid down : 'Tis to be presumed, that an interlining, if the contrary is not proved, was made at the time of making the deed'. . . . . A deed cannot be altered, after it is executed, without fraud or wrong ; and the presumption is against fraud or wrong." That means that this deed, apart from any other proof, would appear to be a proper deed but insufficiently stamped. The vendor was anxious to displace this presumption, because unless or until he was able to do so, it is plain that the assignment appeared to be improperly stamped. In other words, the vendor was seeking to contradict the prima facie presumption arising from the deed itself, a deed which, of course, is a link in the vendor's own title.

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(1) (1851) 16 Q. B. 745.

(2) Ibid. 746.

The purchaser having bought on an open contract, was entitled to have a good marketable title, which, as I understand it, is a title which will enable him to sell the property without the necessity of making special conditions of sale restrictive of the purchaser's rights. The proper stamping of a document is of course an important matter of title, because if the owner of property is called on either to defend his right or to attack a wrong-doer with regard to the property, it is necessary for him to be able to produce his title deeds in evidence without further trouble. If there is an improperly stamped document among these documents, it is a matter which is of serious importance to him. Either he must pay a penalty or he must prove, if the stamp is not in accord with the consideration paid, that there has been some subsequent alteration made in the document. The purchaser has a right to have every title deed in a state in which it will be available.

The declaration in the form in which it was sent originally was obviously insufficient. The first question to be determined is whether the purchaser could be compelled in any circumstances to accept a statutory declaration at all in a case where the vendor on an open contract was seeking to contradict the facts as they appear prima facie from the title which he had deduced in his abstract. As I have already said, apparently on the face of the abstract there was a flaw in the title in that there was an insufficiently stamped deed. In my judgment, on an open contract, it is not open to a vendor to insist on a purchaser accepting a statutory declaration or other evidence which is put forward for the purpose of contradicting something which would prima facie appear to be the state of facts existing from the abstract itself. Of course there are cases in which a vendor can insist on a purchaser accepting a statutory declaration with regard to certain facts which appear on the abstract and which support the evidence afforded by the abstract. It may also be that in the case where title deeds are lost a purchaser may be compelled to accept a statutory declaration accounting for the loss and verifying the accuracy of the abstracted documents. It would appear from the decision in the case of *In re Halifax Commercial Banking Co., Ld. and Wood* (1) that in a proper case such a declaration might be forced upon a purchaser on an open contract. The actual decision in that case does not go as far as that, but it appears that in the opinion of the Court of Appeal such a statutory declaration might in circumstances be forced upon a purchaser. The decision of that point was not necessary to the disposal of the particular case.

So far as I am concerned the present case seems to me to be totally different from a case of that kind because as I have pointed out the vendor is selling on an open contract. The purchaser of course had no idea when he entered into the contract that any difficulty of this nature was likely to arise; he was met, when he raised an objection to the title which on the abstract is clearly justified, by the answer: "Although it appears from the abstract that this document is improperly stamped, I will give you certain information which will show that it is in fact properly stamped." I cannot think that it would be right in an action for specific performance to compel a purchaser, who has purchased on an open contract, to take a title of that kind; because no man purchasing property in such circumstances could prudently resell the property on an open contract.

After the original statutory declaration had been delivered, this summons was taken out on January 24, 1936, when the vendor submitted to the purchaser a statutory declaration in a different and more enlarged form. This declaration, which was dated February 10, 1936, is certainly fuller and elucidates the difficulty which had arisen more clearly. Even then it does not state that the declarant had personal knowledge of the actual facts he was stating; and it is significant that in the original declaration it had been stated that the declarant was concerned as solicitor for the parties in the particular deed, whereas in the altered declaration the statement is that the firm in which he was a partner was so concerned. The altered statement would leave some doubt in the purchaser's mind whether the declarant was a person able to state the facts in the declaration of his own knowledge.

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(1) 79 L. T. 536.

In my judgment the vendor has not properly answered the requisition which was raised by the purchaser's solicitor. I do not think, having regard to the fact that this was an open contract, that the purchaser could be compelled to accept a statutory declaration which on the face of it was directed to contradicting the prima facie title as shown by the abstract.

Solicitors: *Sharpe, Pritchard & Co., for Howard Cant & Cheatle, Birmingham; D. E. G. Fearn, for V. Geoffrey Parker, Birmingham.*

A. R. T.

FARWELL J.
1936
June 16.

In re FENWICK'S WILL TRUSTS.

FENWICK *v.* STEWART.

[1935. F. 1577.]

Will—Construction—Tenant for Life and remainderman—Contingent legacy—Legacy duties payable thereon a charge on corpus.

Contingent legacies are excluded from the rule in *Allhusen* v. *Whittell* (1867) L. R. 4 Eq. 295, and the whole of the legacy duty payable on contingent legacies given free of duty is a charge on the corpus of the estate.

ADJOURNED SUMMONS.

By his will, dated September 2, 1924, the testator appointed his wife, the defendant Sylvia Stewart, and the plaintiffs to be executors and trustees. After giving certain other legacies, he gave, by clause 7, a sum of 20,000*l.* free of duty to his trustees upon trust during the life of his adopted daughter Muriel to use the whole or such part of the income thereof as they should think fit for her benefit, and (within the limits permitted by law) to accumulate the remainder of such income and after the death of his adopted daughter, to hold the capital and accumulations, if any, of such legacy upon trust in equal shares for such of her children and the issue of deceased children per stirpes and not per capita as survived her and attained the age of twenty-one, and if there should be no such children or issue then the same should fall into his residuary estate, provided always that at any time and from time to time during the trust thereby created it should be lawful for his trustees in their uncontrolled discretion (but during the lifetime of his wife only with her consent) to use the whole or any part of the capital and accumulations, if any, of the legacy in any manner which they might think fit for the benefit of his adopted daughter (whether on her marriage with their approval or on any other occasion) or of her children and remoter issue or any of them or to make over the same to her or them or any of them absolutely. Subject to a power of appointment by will or codicil given to his wife to grant the sum of 200*l.* per annum to her sister, he gave and devised his residuary real and personal estate upon trust for his wife, now the defendant Sylvia Stewart, for life, with remainder to the defendant R. D. Poole. By a codicil, dated October 14, 1924, the testator reduced the legacy of 20,000*l.* given by clause 7 of his will to a legacy of 15,000*l.*

The testator died on November 28, 1924. Certain investments were appropriated out of the capital of the estate on October 1, 1925, to meet the settled legacy of 15,000*l.*, and the whole of the income received by the trustees from those investments has since been paid or applied by them to or for the benefit of the testator's adopted daughter. In 1929, on the occasion of the marriage of the testator's adopted daughter, the trustees appropriated investments to the value of 8515*l.* out of the investments then representing the trust legacy and settled them upon her. On subsequent dates the trustees raised sums amounting to 330*l.* and paid the amounts to the adopted daughter. Legacy duties in respect of the income derived from the settled legacy and paid to the adopted daughter were paid by the tenant for life until 1932, when the trustees received a letter from her solicitors objecting to making the payment and claiming that the duties ought properly to be paid out of the capital of the testator's residuary estate. The legacy duties payable on the 8515*l.* and the subsequent sums raised by the trustees were paid out of the capital of the residuary estate.

The plaintiffs took out this summons, which by the first question asked that it might be determined whether upon the true construction of the will and codicil: (A) The legacy duty and interest thereon already paid and hereafter to be paid in respect of the income of the trust legacy of 15,000*l.* and (B) the legacy duty and interest thereon paid in respect of the sums which had been raised or might hereafter be raised out of the capital of the trust legacy and paid or applied to or for the benefit of the adopted daughter, ought to have been paid and were to be paid or provided out of the capital or out of the income of the testator's residuary estate or partly out of each and if so in what proportions.

Rawlence for plaintiffs.

J. H. Stamp for tenant for life. The legacy given to the testator's adopted daughter by clause 7 of the will is a contingent legacy, and contingent legacies are expressly excluded by Page Wood V.-C. in *Allhusen* v. *Whittell* (1) from the rule in that case. It follows, therefore, that the legacy duties already paid and that may be paid in the future are a charge on the corpus of the estate.

Neville Gray for remainderman. There is no reason why the rule in *Allhusen* v. *Whittell* (2) should not apply in this case. It was applied in *In re Perkins* (3) and *In re Poyser.* (4)

(1) L. R. 4 Eq. 295, 303.
(2) Ibid. 295.
(3) [1907] 2 Ch. 596.
(4) [1910] 2 Ch. 444.

It should be applied here and the legacy duties should be dealt with in accordance with the rule.

Stamp in reply. *In re Perkins* (1) and *In re Poyser* (2) are cases of contingent debts, and have no bearing on the present case.

FARWELL J. The question I have to determine involves the consideration of the rule in *Allhusen* v. *Whittell.* (3) The rule is well known and is designed to do substantial justice between capital and income, but it may in some cases produce inconvenience and hardship. As I understand the authorities the rule is one which the Court is bound to apply save in exceptional cases.

The difficulty in this case is in connection with the legacy of 15,000*l.* in favour of the testator's adopted daughter. It is a legacy to trustees upon trusts under which they have a complete discretion to use such part of the income as they think fit for the benefit of the adopted daughter and to accumulate the balance, with a gift over on her death of the capital and accumulated income to her children, but if she has no children, who attain a vested interest, then the legacy is to fall into residue. There is a further provision under which the trustees can take out of capital any sum or sums and pay or apply the same to or for the benefit of the adopted daughter or her children, or remoter issue. The result is that the adopted daughter is only entitled to such part of the legacy as the trustees see fit to pay to her. She may receive capital sums in respect of the legacy or she may get only such part of the income as the trustees choose to pay.

What happened in the present case is that the trustees, in the exercise of their discretion, have made large payments out of the 15,000*l.* to or for the benefit of the adopted daughter and the legacy is now reduced to 6000*l.* The question I have to decide is with regard to the legacy duty payable from time to time in respect of this legacy. It is said that this is in effect a contingent legacy, because no part of it would

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(1) [1907] 2 Ch. 596.

(2) [1910] 2 Ch. 444.

(3) L. R. 4 Eq. 295.

FARWELL J.

1936

FENWICK'S WILL TRUSTS, *In re.*

FENWICK *v.* STEWART.

have been applied if the trustees had seen fit to accumulate the whole. The capital sum would then have remained without deduction, and if the adopted daughter died without issue would fall into and form part of the residue. It is said that it is in effect a contingent legacy of such sum or sums as from time to time the trustees decide to pay, and in the case of a contingent legacy the rule in *Allhusen* v. *Whittell* (1) does not apply. In dealing with contingent legacies (2), Page Wood V.-C. treats them as apart from immediate payments for testamentary expenses and debts and general legacies. He applies the rule to those payments but he expressly excludes from the rule contingent legacies. It has been argued that in other cases, *In re Perkins* (3) and *In re Poyser* (4), no such exception was made; but those were cases of contingent debts, not contingent legacies. I have to decide whether this is a contingent legacy. When I read the whole provisions of clause 7, I can only come to the conclusion that this is a series of contingent legacies. Till the trustees have determined to make payments the adopted daughter is in the position of a person entitled to a contingent legacy or legacies. If that be the true construction of the provisions in clause 7, this is a case where the Court is dealing with contingent legacies. Having regard to the fact that Page Wood V.-C., who decided *Allhusen* v. *Whittell* (1), excepted contingent legacies from the rule, I follow his decision by saying that the rule does not apply to cases of contingent legacies. There must be a declaration that the legacy duties referred to in (A) and (B) of the first question of the summons are payable out of corpus.

Solicitors: *Williams & James*; *Bartlett & Gregory.*

(1) L. R. 4 Eq. 295.

(2) Ibid. 303.

(3) [1907] 2 Ch. 596.

(4) [1910] 2 Ch. 444.

P. J. B.

Applied. Re Mount Edgcumbe Settled Estates. [1950] 2 All E.R. 242.

In re WHITE-POPHAM SETTLED ESTATES and *In re* THE SETTLED LAND ACT, 1925.

C. A.
1936
July 30.

Applied. *In re* Earl Mount Edgcumbe [1950] Ch. 615

[1936. M. No. 1679.]

Settled Land—Scheme to raise moneys by sale or mortgage for benefit of tenant for life—Powers of the Court—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *s.* 64, *sub-s.* 1.

Sect. 64, sub-s. 1, of the Settled Land Act, 1925, provides: "Any transaction affecting or concerning the settled land, or any part thereof, or any other land (not being a transaction otherwise authorised by this Act, or by the settlement) which in the opinion of the Court would be for the benefit of the settled land, or any part thereof, or the persons interested under the settlement, may, under an order of the Court, be effected by a tenant for life, if it is one which could have been validly effected by an absolute owner."

A tenant for life of settled land being desirous of paying off debts incurred by him in the upkeep of the estate, prepared a scheme and applied under the above mentioned section asking the Court to sanction the raising of the necessary amount by sale or mortgage of part of the settled land. The judge in Chambers refused the application, holding that he had no jurisdiction, as the scheme was not for the benefit of the settled land:—

Held, on appeal, that the Court had jurisdiction, inasmuch as the section was wide in its terms and applied not only to the settled land but also to persons interested under the settlement. The scheme being for the benefit of persons interested under the settlement, the appeal must be allowed and effect given to the scheme.

Originating Summons; appeal from Eve J. sitting in Chambers.

The applicant, Francis Cameron Popham-Macpherson, was the tenant for life of the White-Popham Settled Estates under an indenture of resettlement dated July 1, 1924. The respondents were the trustees under the resettlement and other persons beneficially entitled thereunder in remainder. Upon coming into the estate, the applicant paid all expenses incurred by reason of the succession thereto and other obligations under the settlement, by raising moneys on the security of the estate by virtue of powers conferred on him by the settlement. The settlement contained the usual forfeiture clause, and in the event of any act amounting to a forfeiture the trustees were empowered to enter into possession and administer the estate for the benefit of the persons entitled thereto under the settlement. The applicant had incurred debts in maintaining the estate amounting in all to 6250*l.* As his creditors were pressing him he applied to the Court under s. 64 of the Settled Land Act, 1925, to sanction the following transaction :—

"(1.) (*a*) That there shall forthwith be raised by sale or mortgage of all or some part or parts of the above mentioned settled estates a sum of 6500*l.* and that such sum shall be applied by the said trustees in paying the costs of all parties to this application to be taxed as hereinafter mentioned and secondly in paying the first year's premium on the policy of assurance hereinafter mentioned and thirdly as to the balance of the said sum in paying the same to Messrs. Batten & Co., the applicant's solicitors on their undertaking to apply the same in paying the debts of the applicant amounting together to 6230*l.* 9*s.* 6*d.*

(*b*) That the said sum of 6500*l.* shall be raised and applied as aforesaid on the terms and conditions following namely (i.) that the applicant shall effect and vest in the said trustees upon the trusts of the said resettlement a policy of assurance for 7000*l.* on his life ; (ii.) that the premiums on the said policy of assurance shall be charged on and made payable by the trustees for the time being of the said resettlement out of the net rents and profits of the said settled estates accruing during the life-time of the applicant in priority to all other payments thereout or estates or interests therein arising under the said resettlement and (iii.) that the applicant shall execute in favour of the trustees a deed of assignment to give effect to the scheme.

(2.) That the costs of all parties and expenses incurred in carrying out the transaction be taxed as between solicitor and client and paid as provided by para. 1 (*a*) hereof."

On July 28, 1936, the matter came before Eve J. in Chambers, who declined to sanction the scheme on the ground that he had no jurisdiction to do so, since the scheme was not for the benefit of the settled land.

The applicant appealed.

Elverston for the appellant. The learned judge held he had no jurisdiction. I submit that the scheme was for the benefit of persons interested under the settlement, and the section applies. (He was stopped.)

A. C. Nesbitt for the defendants, trustees. Although we are not opposing the application, it is our duty to protect the settled land. The learned judge held that the scheme was not for the benefit of the settled land.

G. D. Johnston for defendants interested in remainder. This is not a transaction "affecting or concerning" the settled land, nor is it for the benefit of persons interested under the settlement but only one of them. It is in substance a transaction dealing with capital moneys by way of unauthorized investment—namely, lending the same to the tenant for life. The land is only affected by reason of the sale or mortgage to raise funds, and this is only incidental. It would be a curious result if the Court's jurisdiction to sanction such a scheme depended on there being no capital moneys already available.

LORD WRIGHT M.R. This is an appeal from an order in Chambers of Eve J. refusing the application on the ground that he had no jurisdiction under s. 64 of the Settled Land Act, 1925. The application is made by the tenant for life asking the Court to sanction a transaction enabling him to pay off a number of debts amounting to about 6250*l.* The object of the scheme is that the trustees of the settled estate should be authorized to raise this sum by sale or mortgage of part of the settled land and apply that sum (1.) in paying the costs of the parties, (2.) in payment of the first year's premium on a policy to be taken out by the tenant for life, and (3.) in payment of the balance to his solicitors to pay off the debts of the applicant. The policy referred to is a policy on the applicant's own life to secure the interests of parties taking in succession, and there is a further provision that subsequent premiums on the policy be secured by being paid in priority

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to other interests out of the rents of the estate. It is not alleged by any one that this transaction is not desirable to carry out. It is in the interest of the applicant and other parties that he should not be made bankrupt. The Court has jurisdiction, and though it involves diminishing the settled land it is nevertheless in the interest of parties interested in the land. I cannot accede to Mr. Johnston's argument: the section is wide in its terms. In my opinion the appeal should be allowed and an order made giving effect to the scheme.

ROMER L.J. I agree.

GREENE L.J. I agree.

Appeal allowed.

Solicitors: *Robins, Hay & Waters, for Batten & Co., Yeovil; Long & Gardiner.*

R. A. Y.

CLAUSON AND LUXMOORE JJ.
1936
May 11; *June* 29.

In re A DEBTOR.

[No. 5 of 1936.]

Bankruptcy—Deed of Assignment for benefit of creditors—Act of bankruptcy—Creditors' petition—Meeting of creditors—Recognition or approval of deed—Sufficient cause for not making order—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 5, *sub-s.* 3.

A petitioning creditor, who has in any way assented to, recognized or approved of a deed of assignment by a debtor, cannot afterwards allege that the execution of the deed constitutes an act of bankruptcy.

When therefore a petitioning creditor has—while not directly assenting to the execution by a debtor of a deed of assignment in favour of creditors—at a meeting of creditors and subsequently, in reply to a letter in which he was asked to confirm what had been said at the meeting, intimated that he would not do anything to upset the deed, but would wait and see what happened, he must be taken to have expressed his approval and recognition of the deed, and the Court therefore will refuse to allow him to take advantage of the execution of the deed as an act of bankruptcy on which a petition can be founded.

In such a case there is " sufficient cause " within the meaning of s. 5, sub-s. 3, of the Bankruptcy Act, 1914, for not making an order.

Ex parte Stray (1867) L. R. 2 Ch. 374 applied.

APPEAL by a debtor against a receiving order made on March 18, 1936, at the Somersetshire County Court. The grounds of appeal were (inter alia) (1.) that the debtor executed a deed of assignment dated January 29, 1936 (which was the act of bankruptcy upon which the petition was founded), upon the faith of a promise made by the petitioning creditor to the debtor, to the trustee under the deed and to other creditors of the debtor present at a creditors' meeting held on the same day, that if the debtor did so the petitioning creditor would not do anything to upset the said deed of assignment ; (2.) that in reliance upon the said promise the debtor executed the deed and the trustee stamped and registered the same ; (3.) that by reason of these matters the petitioning creditor was estopped from alleging the execution of the deed as an act of bankruptcy or relying upon it as an act of bankruptcy, and the registrar ought not therefore to have made a receiving order founded upon the petition ; and (4.) that the registrar was wrong in holding that upon the true construction of a letter dated January 31, 1936, from the petitioning creditor's solicitors to the firm of which the trustee under the deed was a member, the promise by the petitioning creditor, " not to do anything to upset the deed of assignment," was nullified by the reservation or qualification that it did not mean that the petitioning creditor would at no time take bankruptcy proceedings against the debtor, but merely meant that he would stand aside for the present time.

The material facts were stated by Clauson J. in his judgment as follows :—

The debtor in this case was indebted to the creditor in a considerable sum, which formed much the largest of the debtor's liabilities. In December, 1935, the creditor obtained judgment against the debtor. The debtor, under the advice of an accountant, on January 23, 1936, executed a deed of assignment for the benefit of his creditors. That deed was superseded by a like deed which was executed on January 29. On January 27 the creditor, with a view to enforcing his judgment, issued and served the ordinary bankruptcy notice. On January 29 a meeting of the creditors of the debtor was held, two or three hours after the deed had been actually sealed. There is some doubt as to what occurred at that meeting, but certain letters passed afterwards, and I propose to rely on those letters as indicating what occurred, and it is on those letters that the matter principally turns. There is no doubt about this, that the creditor at the meeting of creditors made it quite plain that he was not going to sign the deed. It is suggested that he was appointed, without protest from himself, a member of the committee of inspection. Some conversation took place as to whether or not he would take any steps to upset the deed. On the following day, January 30, the debtor's accountant, who had become trustee under the deed, wrote to the creditor's solicitors as follows: "With reference to the meeting of creditors held yesterday, I shall be glad if you will kindly confirm the promises you then made on behalf of your client"—that is the petitioning creditor—"in this connection:—(1.) [The creditor's] claim against the estate to be set aside, (2.) That he will not upset the deed of assignment, (3.) That he will not make [the debtor] bankrupt. The deed is to-day being forwarded for registration in accordance with the resolution passed at the meeting." The answer, dated the following day, sent by the creditor's solicitors, was this: "In reply to your letter of the 30th instant. We desire to confirm what we arranged to do at the meeting of creditors on 29th inst. as follows: (1.) Not to do anything to upset the deed of assignment, (2.) Not to enforce the bankruptcy notice which has been served on [the debtor]. This, of course, does not mean that we will at no time take bankruptcy proceedings against [the debtor]; it merely means that we shall stand aside for the present time, and will not assent to the deed." Then there are four lines which deal with a matter in dispute, a transaction in respect of which the creditor thought he had not been fairly treated by the debtor. I do not propose to go into the details of that. I mention it merely for this reason, that because of the obscurity surrounding the transaction mentioned in the latter part of that letter, when this matter was before the Divisional Court recently, it stood over in order that further evidence should be furnished, and further evidence has been put in.

Now that this further evidence is before the Court, another matter has come out which is material. The trustee on February 3 wrote to the creditor. The letter is headed: "[The Debtor]; Under Deed of Arrangement." "I propose that a meeting of the committee be held at this office on Friday next, the 7th inst., at 3 P.M. to decide what immediate steps shall be taken in connection with the estate. I trust the suggested time will suit your convenience." The creditor's solicitors reply on February 5: "[The creditor] has handed us your letter of 3rd inst. intimating that a meeting of the committee will be held at your office on Friday next, 7th inst., to decide what immediate steps shall be taken in connection with the above estate. Whilst willing to give such advice as he can in the matter of dealing with the debtor's stock at . . . . ., which he can do by post, our client does not feel disposed to spend time in attending committee meetings at the moment. We shall, however, be pleased to receive on [the creditor's] behalf, details as to what it has been decided to do, and also with regard to the payment of the 500*l.* to the bank by [the debtor]." That is the matter which I have said was mentioned in the last paragraph of the letter of January 31. That would seem to indicate that the trustee under the deed was treating the creditor as a member of the committee of inspection; the letter can have no other meaning, and the answer would seem to indicate that the creditor acquiesces in the position of being a member of the committee, although he is not going to attend the meeting but he will give assistance by post. We have got now to February 5. The creditor prepared a bankruptcy petition, dated March 2, and filed it on March 4, which it will be observed is more than

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a month after the time that he had committed himself to the position (whatever it is) which is recorded in the letter of January 31. That petition is based upon the execution of the deed as an available act of bankruptcy. It will be borne in mind that he had agreed not to enforce the bankruptcy notice, but the petition was not based on the bankruptcy notice, it was based on the execution of the deed of assignment.

A. E. Woodgate for the debtor, the appellant. It is well settled that if a creditor has by any act acquiesced in the execution by a debtor of a deed of assignment for the benefit of his creditors he cannot make it the basis of a bankruptcy petition. This is what, it is submitted, has happened in the present case. See *In re Brindley* (1); *In re a Debtor* (2); see also *Ex parte Alsop* (3); *In re Michael.* (4) Here is a very strong instance, it is submitted, of acquiescence; compare *In re Hawley* (5); *In re Woodroff.* (6) The principle is, had the creditor so far assented as to preclude himself from taking advantage of the deed as the basis of a petition? See *In re Brindley* (1); *In re a Debtor* (No. 24 of 1924) (7); *In re a Debtor. Ex parte Newburys Ld.* (8) These cases are cases where the recognition is after the deed. In the case now before the Court there was a promise by the petitioning creditor to the debtor, to the trustee and the other creditors at the meeting; there was consideration and therefore a contract. Also this case falls within the principle of recognition by the creditor, although no formal assent; therefore the Court will not allow him to rely on it as an act of bankruptcy.

van den Berg K.C. and *C. B. Guthrie* for the respondent. It is submitted that the burden here is on those who assert that the creditor is deprived of his right to present a petition in bankruptcy by acquiescence. There is no consideration for any alleged promise and the argument really is in the nature of a question of public policy. There is nothing in the letters which can be said to amount to an assent by the creditor. The principles enunciated by Lord Cairns in *Ex parte Stray* (1) do not apply here. [He also referred to *In re a Debtor.* (2)]

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(1) [1906] 1 K. B. 377, 383.
(2) Ante, p. 165.
(3) (1859) 1 D. G. F. & J. 289, 298.
(4) (1891) 8 Morr. 305, 309.
(5) (1897) 76 L. T. 501.
(6) Ibid. 502.
(7) (1924) 94 L. J. (Ch.) 42.
(8) (1926) 95 L. J. (Ch.) 199.

A. E. Woodgate in reply.

CLAUSON J. [after stating the facts as above set out, continued :] It must be borne in mind that under the Bankruptcy Act, 1914, s. 5, sub-s. 3, the Court may dismiss a petition if it is satisfied that for some other sufficient cause —that is other than failure to prove the debt, and so on— no order ought to be made. That is a very wide power to be given to the Court, but it has been the practice ever since the decision in *Ex parte Stray* (1) to dismiss a petition where the circumstances prove that it is within the circumstances of which Lord Cairns speaks in that case as circumstances which preclude the petitioning creditor from relying on the execution of a deed of assignment as an act of bankruptcy. Lord Cairns said in that case : " It is well settled by a series of authorities, of which the case of *Ex parte Alsop* (3) may be mentioned as the last, that a creditor, who is a party or privy to a deed of the description mentioned in the statute "—and it is not disputed that the deed of assignment in the present case is such a deed—" or who has acted in any way which would be equivalent to an assent, recognition, or approval of the deed, cannot allege that the execution of the deed is an act of bankruptcy."

We therefore have here to consider, and the registrar should have considered (but I doubt whether the point was put as clearly before him as it has been put before us), whether the petitioning creditor in this case has acted in a way which would be equivalent to assent, recognition or approval of the deed. It is plain that he did not act in such a way as to assent. He made it quite clear that he was, to use the common phrase, standing outside the deed ; but did he recognize or approve the deed ? Speaking for myself, I have some difficulty in seeing what clearer recognition there can

(1) L. R. 2 Ch. 374, 378.
(2) Ante, p. 165.
(3) 1 D. G. F. & J. 289.

be of the deed than to say deliberately and clearly, first of all, as it would seem, at a meeting of creditors, and, secondly, in answer to a letter in which he was asked to confirm what had been said at a meeting of creditors: "I am not going to do anything to upset the deed of arrangement"; all the more so when at the same time he says: "I stand outside for the present; I will not assent to the deed." Is he not saying quite clearly: "I am not going to assent to the deed; I am going to stand outside and see what happens. I recognise the deed has been executed and I am not going to try to upset it." That is an attitude which may suit the creditor very well; he may look forward to a time when he will be in a position to get 20*s.* in the £; but whatever the motives may be of taking up that attitude, it seems to me plainly a recognition of the deed, and indeed an approval of it, because when a man says "I do not propose to take any steps to upset the deed," he is saying "I do not assent to it nor do I agree to be bound by it; I do not mind the deed; so far as it goes, it is not a bad thing." That is approval.

It is a little significant—I will not put it higher than that—that there does appear to have been some arrangement that if he was not to be actually a member of the committee of inspection, at all events he was going to take a benevolent interest in the matter by giving advice. That appears in the letter of February 5, in which his solicitor says: "Whilst willing to give such advice as he can in the matter of dealing with the debtor's stock at . . . . ., which he can do by post"—that means dealing by the trustee—"our client does not feel disposed to spend time in attending committee meetings at the moment. We shall, however, be pleased to receive on the creditor's behalf, details as to what it has been decided to do. . . . ."

On those facts it seems to me it is a plain case, not of assent to the deed, but of recognition or approval of the deed. That being so, having regard to the statement of the practice by Lord Cairns, the Court is bound to refuse to allow the creditor to take advantage of the execution of the deed as an act of bankruptcy on which a petition can be filed and to hold that

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there is sufficient cause within the meaning of s. 5, sub-s. 3, of the Bankruptcy Act, 1914, for not making an order.

The decision of the registrar making a receiving order must be reversed, and the petition must be dismissed, and the petitioning creditor must pay the costs.

LUXMOORE J. I agree and have nothing to add.

Solicitors: *May, Sykes & Co., for William Ormiston, Bristol; Collyer-Bristow & Co., for A. B. Lemon & Watts, Salisbury.*

A. R. T.

In re S. P. (DECEASED).

Ex parte THE OFFICIAL RECEIVER.

[No. 1 of 1935.]

LUXMOORE J.

1936

July 6, 13, 14.

Bankruptcy—Trader—Wife's advances for purposes of business—Death of trader—Insolvency—Administration of estate by widow—Payment as administratrix of moneys (the property of deceased debtor) into her private account—Subsequent order for administration of estate in bankruptcy—Widow's right of retainer—Special Case—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 36, *sub-s.* 2; *s.* 100, *sub-s.* 3; *s.* 130, *sub-ss.* 8, 9—*Administration of Estates Act,* 1925 (15 *Geo.* 5, *c.* 23), *s.* 34, *First Schedule, Part I.*

S. P., the debtor, died in October, 1934, intestate and insolvent. His widow (who had taken out letters of administration) having in her husband's lifetime advanced him certain moneys for the purpose of his business, and having after his death received certain sums which formed part of his estate and which equalled the amount so advanced by her, on February 1, 1935, paid them as his administratrix into her own private account. On February 8 an order was made for the administration of her deceased husband's estate in bankruptcy, the sums then still remaining in her hands. These sums paid into her own private account having been claimed by the official receiver as trustee of the husband's estate, who alleged that by virtue of s. 36, sub-s. 2, of the Bankruptcy Act, 1914 (replacing s. 3 of the Married Women's Property Act, 1882) and the Administration of Estates Act, 1925, the widow had no right of retainer as against other creditors, a special case was at the request of both parties sent by the county court judge, before whom the matter first came, for the opinion and determination of the High Court:—

Held, that on February 8, the widow had in her hands the sums in question forming part of her husband's estate and that she had not made these sums her own by paying them in to her private account on February 1, for she had no right of retainer as against the other debts due from the estate, which were all of higher degree than the debt owing to her, and the sums must accordingly be handed over to the official receiver.

The principles laid down in *Attorney-General* v. *Jackson* [1932] A. C. 365 applied.

In re Ambler [1905] 1 Ch. 697 not followed.

MOTION.

The object of this application was to obtain the decision of the High Court regarding the question whether, in the administration in bankruptcy of the estate of a deceased person, his widow and legal personal representative was entitled to exercise her power of retainer in respect of moneys previously advanced by her to her late husband for the purpose of his business.

The matter came before the judge of the County Court of Staffordshire on the application in bankruptcy, intituled "*In the matter of S. P. deceased*," of the official receiver for a declaration (as amended) that under and by virtue of the joint effect of s. 36, sub-s. 2, of the Bankruptcy Act, 1914 (replacing s. 3 of the Married Women's Property Act, 1882) and the Administration of Estates Act, 1925, the respondent [to the motion] (the widow and administratrix of the estate of the above-named S. P. deceased), was not entitled to retain out of the estate the sum of 432*l.* 10*s.* or any part thereof, and for an order that the respondent pay the sum of 432*l.* 10*s.* to the official receiver.

By an order of the county court dated May 23, 1936 (in accordance with the desire of both applicant and respondent), it was determined to state the facts in the form of a special case for the opinion and determination of the High Court as provided for by the Bankruptcy Act, 1914, s. 100, sub-s. 3; and that the proceedings be transmitted to the High Court accordingly.

The following statement of facts is taken from the judgment of the learned judge :—

From January 12, 1933, to his death on October 16, 1934, the debtor carried on business as an animal trap manufacturer. On various dates between January 13, 1933, and April 19, 1934, his wife, who is the respondent in the proceedings, advanced to her husband for the purposes of his business various sums amounting in the aggregate to 432*l.* 10*s.* The debtor died intestate, and on January 19, 1935, letters of administration to his estate were granted to the respondent. The debtor's estate included, among other things, a policy of insurance on his life in the London & Manchester Insurance Company. On January 31, 1935, the respondent received from the insurance company the sum of 396*l.* 15*s.* 2*d.* On February 1, 1935, she paid this sum, together with other moneys in her hands as administratrix of her husband's estate (amounting in all to the total sum of 432*l.* 10*s.*), into her private account. On February 8, 1935, an order was made upon a petition presented by the respondent, under the provisions of the Bankruptcy Act, 1914, s. 130, sub-s. 9, for the administration of her husband's estate in bankruptcy.

It was admitted by counsel for the administratrix that this sum of 432*l.* 10*s.* was, at the date of the making of the order, still in her hands. On April 21, 1936, the official receiver, as trustee of the debtor's estate, served the widow with a notice of motion asking for a declaration that under and by virtue of the joint effect of the Married Women's Property Act and the Administration of Estates Act, 1925, or otherwise, the respondent was not entitled to retain out of the estate the sum of 432*l.* 10*s.* or any part of it; and for an order that the respondent pay the sum of 432*l.* 10*s.* to the official receiver. It was agreed by counsel that the declaration as asked did not in terms cover every possible contention, and they agreed that the declaration should be treated as amended by adding at the end of it the words: "and that in the events mentioned

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in the special case the official receiver is entitled to repayment of the said sum of 432*l.* 10*s.*" They also agreed that the special case should be treated as amended by adding a statement to the effect that the 432*l.* 10*s.* remained in the hands of the respondent on February 8, 1935.

W. F. Waite for the official receiver, the applicant. The question before the Court really is whether an administratrix is entitled to exercise her right of retainer in respect of moneys advanced by her to her husband for the purposes of his business. It is submitted that the case of *In re Ambler* (1), which was decided under the Married Women's Property Act, 1882, s. 3 (now replaced by the Bankruptcy Act, 1914, s. 36, sub-s. 2), which case purported to follow two earlier cases, and which gave a married woman such a right of retainer, should not now (having regard to the decision of the House of Lords in *Attorney-General* v. *Jackson* (2)) be considered good law. If there is any right of retainer, it should only be exercised against debts of an equal or lower degree than that owing; and ever since the Act of 1882, money lent by a married woman to her husband for the purposes of his business is a debt of a lower degree than any other debt.

R. A. Willes for the respondent (the widow of S. P. deceased). The order for administration was on February 8, and the money had ceased to form part of the estate of the debtor on February 1, 1935, therefore the official receiver can have no title to the money: see the Bankruptcy Act, 1914, s. 130, sub-s. 8, and compare *In re Rhoades* (3); *In re Gilbert.* (4)

W. F. Waite in reply.

LUXMOORE J. On May 23, 1936, the judge of the Staffordshire County Court, at the request of both parties to the motion, "*In the matter of the estate of S. P. deceased,*" determined, in accordance with the provisions of the Bankruptcy Act, 1914, s. 100, sub-s. 3, to state the facts in the form of a special case for the opinion and determination of

(1) [1905] 1 Ch. 697.

(2) [1932] A. C. 365.

(3) [1899] 2 Q. B. 347.

(4) [1898] 1 Q. B. 282.

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the High Court and to transmit the proceedings to the High Court accordingly.

The material facts are as follows: [His Lordship stated the facts as set out above].

Mr. Willes argued that no question as to the respondent's right of retainer can arise in the present case. He contended that the official receiver has no title to the money because it had ceased to form part of the estate of the debtor on February 1, 1935, that is before the order of February 8, 1935, was made. He relied on the words of s. 130, sub-s. 8. The sub-section is in terms applicable to the case where a creditor of the deceased debtor presents a petition for the administration of his estate according to the law of bankruptcy, but I think that it is plain on the construction of the whole section that sub-s. 8 also applies to the case where the petition is presented under sub-s. 9 by the legal personal representative of the deceased debtor. Sub-s. 8 provides that notice of the presentation of a petition under the section shall, in the event of an order for administration being made thereon, be deemed to be equivalent to notice of an act of bankruptcy, and after such notice no payment or transfer of property made by the legal personal representative shall operate as a discharge to him as between himself and the official receiver or trustee. The sub-section continues in these words: "—save as aforesaid nothing in this section shall invalidate any payment made or any act or thing done in good faith by the legal personal representative before the date of the order for administration."

Mr. Willes contends that as the respondent transferred the 432*l.* 10*s.* to her own account before February 8, 1935, the official receiver can have no title to that sum or any part of it. I think it is clear that if the respondent had paid this sum in satisfaction of the debt or debts of creditors of the estate, other than herself, the section would have applied. The substantial question is whether the transfer of the money to her own private account enables her to say that this sum no longer forms part of her husband's estate. The answer to the question depends on a further question: Had the respondent a right of retainer as against the other creditors of the estate on February 1, 1935? If she had, the money became hers on that date. If she had not, then the money remained in her hands as part of the intestate's estate and the title to it was not affected by the transfer of the money from her account as administratrix to her own private account.

The money was admittedly owing to her in respect of loans made by her to the intestate for the purposes of his business. By the Bankruptcy Act, 1914, s. 36, sub-s. 2, it is provided that "Where the husband of a married woman has been adjudged bankrupt, any money or other estate of such woman lent or entrusted by her to her husband for the purpose of any trade or business carried on by him or otherwise, shall be treated as assets of his estate, and the wife shall not be entitled to claim any dividend as a creditor in respect of any such money or other estate until all claims of the other creditors of her husband for valuable consideration in money or money's worth have been satisfied"; in other words, the wife is postponed in the manner stated to the other creditors, and the other creditors are, to that extent, given a priority over her debts. This section replaces s. 3 of the Married Women's Property Act, 1882, which is repealed by the Bankruptcy Act, 1914.

By s. 34 of the Administration of Estates Act, 1925, it is provided by sub-s. 1: "Where the estate of a deceased person is insolvent, his real and personal estate shall be administered in accordance with the rules set out in Part I. of the First Schedule to this Act." That Part of the First Schedule provides that the funeral, testamentary and administration expenses shall have priority, and, secondly, that: "Subject as aforesaid, the same rules shall prevail and be observed . . . ., as to the priorities of debts and liabilities as may be in force for the time being under the law of bankruptcy with respect to the assets of persons adjudged bankrupt."

It was decided by the Court of Appeal in *In re Ambler* (1), purporting to follow *In re May* (2) and *In re Leng* (3), that s. 3

(1) [1905] 1 Ch. 697.
(2) (1890) 45 Ch. D. 499.
(3) [1895] 1 Ch. 652.

LUXMOORE J.

1936

S. P., *In re.* THE OFFICIAL RECEIVER, *Ex parte.*

of the Married Women's Property Act, 1882, did not affect the right of retainer of a married woman who is the legal personal representative of her deceased husband in respect of a loan made by her for business purposes, and that, although that section, read in combination with s. 10 of the Judicature Act, 1875, prevents a wife from proving for such a loan in the administration of her deceased husband's estate (if insolvent) in competition with his creditors for value, yet if she is her husband's executrix she can, as against those creditors, retain the amount of the loan out of assets in her hands as executrix. As I have said, s. 3 of the Married Women's Property Act, 1882, is replaced by s. 36, sub-s. 2, of the Bankruptcy Act, 1914, and s. 10 of the Judicature Act, 1875, has also been replaced by s. 34 and Part I. of the First Schedule of the Administration of Estates Act, 1925, but there is no substantial difference in the verbiage of the old sections and those which have replaced them.

The decision in *In re Ambler* (1) had this result, that although a wife's loan to her husband for business purposes is postponed by statute to the other creditors for the purposes of dividend where the estate is insolvent, yet if she were her husband's legal personal representative she could defeat the provisions of the statute and obtain priority over the other creditors. The decision was considered recently in the House of Lords in the case of *The Attorney-General* v. *Jackson.* (2) In that case it was held that a legal personal representative's right of retainer could not be exercised so as to defeat debts which were given priority by the Bankruptcy Act, 1914. The particular debts considered in that case were those due to the Crown. It seems to me that there is no difference in principle between the case where a debt is given priority by the express terms of a statute and the case where the priority is given to a particular class of debts by the express postponement of that class to another class of debts. Lord Atkin said in the course of his judgment: "In *In re Ambler* (1) the judges followed the dicta in *In re Leng* (3), though both Farwell J.

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(1) [1905] 1 Ch. 697.

(2) [1932] A. C. 365, 374, 385.

(3) [1895] 1 Ch. 652.

and Stirling L.J. would have themselves decided otherwise. I do not think that there was any decision constraining the Court of Appeal to decide *In re Ambler* (1) as they did. It may be that the decision can be supported by reference to the more restricted rules as to the effect of the Bankruptcy Act governing the administration of estates under an order of the Court before the Act of 1925. And it is possible that the position of debts covered by s. 36 of the Bankruptcy Act which, by sub-s. 2, takes the place of the Married Women's Property Act, 1882, s. 3, may at some future time be held not to be in a lower degree than the debts to which they are postponed, though I cannot foresee the reason for so holding. But I am satisfied that, unless *In re Ambler* (1) can be distinguished in some such way, it should not be followed in this House so as to defeat what appears to me to be a very plain application of the well established law relating to retainer. I am of opinion that to the extent to which the Crown's claim for taxes is given priority in bankruptcy it is a debt of higher degree than that of the executrix in this case and that she cannot exercise her right of retainer in priority to such claim." Lord Tomlin also said: "The right to retain or to prefer has not been altered, but the degrees in which debts are ranged have been changed, and it is in the field as so changed that the rights in question must to-day operate. The result is that all debts fall within one or other of two degrees. There are no other degrees where the Act of 1925 applies. If, therefore, a legal personal representative is a creditor for a debt in the higher of the two degrees he can retain against all creditors of whichever degree they may be. If, however, his debt falls within the lower degree he can retain against all creditors of such degree, but against none in the higher degree." It will be observed that Lord Tomlin states that there are only two degrees in which debts are ranged. This is of course a general statement, and his mind was not directed to the position of debts owing to a wife from her dead husband's insolvent estate in respect of loans made by her for the purpose of his business. Although no doubt forming an

(1) [1905] 1 Ch. 697.

attenuated class these debts appear to me to constitute a third degree. Speaking of *In re Ambler* (1) Lord Tomlin also said: " It is, however, difficult to reconcile with the decision in *In re Ambler.* (1) It is true that that case was decided upon different statutes, and at a time when the whole field of insolvency was not occupied by the bankruptcy rule of priorities of debts, and on these grounds some distinction may be founded. I am satisfied, however, that, whether distinguishable or not, it ought not to afford a guide to your Lordships' House in resolving the question now under consideration." I am unable to appreciate any principle on which *In re Ambler* (1) can, for the purposes of the present case, be distinguished from the decision of the House of Lords, and in my judgment the principle of the latter decision must govern this case.

In the result I hold that on February 8, 1935, the respondent had in her hands the sum of 432*l.* 10*s.*, forming part of her husband's estate, and that she had not made this sum her own by paying it into her private account, for she had no right of retainer as against the other debts due from the estate, which were all of higher degree than the debt owing to her. I therefore order that the respondent do pay to the official receiver the sum of 432*l.* 10*s.* The respondent must pay the costs of the motion.

Solicitors: *Needham & Barrow, for S. J. Grey & Willcox, Birmingham; Underhill, Neve & Co., Wolverhampton.*

(1) [1905] 1 Ch. 697.

A. R. T.

CLAUSON J.

1936
July 13.

In re HORDER.

Ex parte THE TRUSTEE.

[1023 of 1935.]

Bankruptcy—Debtors to bankrupt's estate—Motion by trustee—Motion directed to stand over with a view to an action—Jurisdiction of Court of Bankruptcy—Practice—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 105.

The Court exercising jurisdiction in bankruptcy has a wide discretion under s. 105 of the Bankruptcy Act, 1914, and where matters are brought before the Court on motion which in the view of the Court can more conveniently be dealt with in an action, the Court may direct the motion to stand over with a view to the issue being determined in an action.

Ellis v. *Silber* (1872) L. R. 8 Ch. 83 and *Ex parte Dickin* (1878) 8 Ch. D. 377, considered.

BANKRUPTCY MOTION.

By this motion the trustee of a bankrupt who was adjudicated on his own petition on September 25, 1935, asked (inter alia) for a declaration that the respondents were liable to indemnify the bankrupt's estate in respect of certain claims.

The trustee alleged that in or about the middle of 1934 the first respondent was honorary treasurer and the second respondent president of the " People's Empire Council," and that in or about July, 1934, the bankrupt accepted employment with the respondents. It was stated in Court that the bankrupt attributed his position to his having incurred liabilities on behalf of the " People's Empire Council " and it was further stated that the " People's Empire Council " was at the time of the hearing of the motion an unidentifiable body which, except for the publication of a pamphlet called " Sunrise," did not exist.

On the motion, the applicant (the trustee) asked for (I.) a declaration that the respondents were liable to indemnify the bankrupt in respect of all claims which had been made in the bankruptcy or, alternatively, in respect of such claims as arose out of the dealings of the "People's Empire Council" or the clubs operated by or in connection with it; (2.) an order that an account be taken between the applicant and the respondents of the amount of the bankrupt's indebtedness in respect of the claims; (3.) an order on the respondents to pay to the applicant the sums found to represent that indebtedness; and (4.) an order on the respondents to pay the costs of the motion and of the taking of the account. Counsel for the first respondent took the preliminary objection that the relief sought should have been claimed by action and not by motion in the bankruptcy.

Gallop for the applicant. The applicant, as trustee, is claiming that the whole of the bankrupt's debts are really debts of the respondents, and he claims by the motion a declaration to that effect. It is true to say that, in addition to asking for that declaration, he is asking for an order for payment and for consequential relief. All that the Court has to consider is whether it has jurisdiction to deal with the matter. The Court's power is defined by s. 105 of the Bankruptcy Act, 1914, which has been the subject of judicial decision apparently limiting its very general terms. The decisions seem to lay down one principle only, namely, that, if the trustee is claiming by a higher title than the debtor, the Court of Bankruptcy will assume jurisdiction: and it has been said that, if the claim is a mere money demand, that is a fitting matter for the Common Law Courts, and the Court of Bankruptcy should not assume jurisdiction. The proviso to s. 105, sub-s. 1, clearly gives the County Court jurisdiction to adjudicate upon claims arising out of the bankruptcy, subject to the limited value of 200*l.*: and it must follow that a similar jurisdiction, without, of course, the limit as to value, was given to the High Court in Bankruptcy. As to the suggestion that there might be a desire for trial by jury, or that a serious issue of fact or as to character may be involved, this is expressly covered by sub-s. 3, which provides for trial by jury in the same manner as if it were part of an issue of fact in an action. There is no case at all which precludes the Court of

Bankruptcy from dealing with such a case as the present. If this argument is right the Court has power to deal with the matter, and it is both cheaper and fairer to deal with it on the motion. The Act specifically empowers the Court so to deal with it.

Tindale Davis and *G. O. Slade* for the first respondent were not called upon. It was stated in Court that at the time of the hearing of the motion the second respondent had not yet been served.

CLAUSON J. The bankrupt seems to have acted in connection with a somewhat amorphous body, the leading lights of which were the two respondents to the motion, and the applicant, the trustee in bankruptcy, is disposed to take the view that the bulk of the debts which the bankrupt incurred were debts for which he became liable as a mere name, and there is some prima facie ground for that view. In the circumstances the matter is a serious one for the two respondents. It appears from a perusal of the papers in the case that other matters besides those merely monetary may come into consideration. The applicant is applying by motion for a judgment against the respondents to indemnify the estate against the claim, and the respondents take the objection that the case is one which should be left to be determined by the Court.

The Court has a very wide jurisdiction under s. 105 of the Bankruptcy Act, 1914. That jurisdiction, as conferred by the Bankruptcy Act, 1869, has been referred to by Lord Selborne, L.C. in the House of Lords in *Ellis* v. *Silber* (1) in certain terms which are very well known to those experienced in bankruptcy practice and to which I will not further allude, and has been referred to also by Sir George Jessel, M.R., in *Ex parte Dickin.* (2) Far be it from me, especially in view of Lord Selborne's observations, to say one single word which could possibly be construed as limiting the Court's jurisdiction in any way. I observe, however, that during the last fifty years there has grown up a practice, which I will not attempt to define in words, by which the Bankruptcy Court has not

(1) L. R. 8 Ch. 83.

(2) 8 Ch. D. 377.

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1936
HORDER, *In re.*
THE PUBLIC TRUSTEE, *Ex parte.*

hesitated to exercise its jurisdiction in cases raising bankruptcy points, while there is another class of case in which the Court has left matters to be determined by the ordinary tribunal. I do not propose to go into reasons. As matters stand at present there seems to be a great deal of practical convenience in allowing that practice to continue.

In the present case the respondents seem to me to be not unreasonably taking up the attitude that the ordinary procedure should be adopted, and I do not propose to interfere with that course being taken. I will give an opportunity to the applicant to bring an action to raise the issue which it has been sought to have tried on the motion. I will order that the motion stand over generally, that if an action is started by the applicant within three months the motion shall not be restored until the action has been dealt with or disposed of, and that if no action is brought within three months the respondents shall have liberty to apply with regard to the costs.

Solicitors: *Laytons; Ford, Michelmore, Rose & Wilkins.*

K. R. A. H.

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nsidered. *In re* EVANS' WILL
RUSTS. [1948] 1 Ch. 185

In re RIDDELL.

PUBLIC TRUSTEE *v.* RIDDELL.

[1936. R. 118.]

FARWELL J.
1936
July 8, 9.

Public Trustee—Income fee—Life annuities—Public Trustee Act, 1906 (6 & 7 *Edw.* 7, *c.* 55), *s.* 9.

A testator appointed the Public Trustee to be one of the executors and trustees of his will. He bequeathed several annuities and disposed of his residuary estate:—

Held, that the income fee, to which the Public Trustee is entitled under s. 9 of the Public Trustee Act, 1906, is an administration expense and that no part of it is payable out of the annuities.

In re Bentley [1914] 2 Ch. 456 dissented from.

ADJOURNED SUMMONS.

By his will, dated August 10, 1934, the testator appointed his wife, the defendant Lady Riddell, and the plaintiff to be

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RIDDELL, *In re.*
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v
RIDDELL.

his executors and trustees. After bequeathing several legacies and annuities, he bequeathed to Lady Riddell during her life an annuity of 8000*l.* free of death duty. The testator then gave other legacies, and directed his trustees to pay the whole of his residuary estate to several named charities in certain proportions. The testator died on December 5, 1934. The plaintiff took out this summons raising various questions on the testator's will, and, on leave to amend being obtained, a supplementary question was added to the summons asking that it might be determined whether the Public Trustee's income fee payable in respect of the income required to discharge (*a*) the annuity bequeathed to Lady Riddell and (*b*) the other annuities bequeathed by the testator ought to be borne (i.) by such annuities respectively or (ii.) by the income or capital of the residuary estate.

Wilfrid Hunt for plaintiff.

Neville Gray for Lady Riddell. The income fee is an administration expense, and the general principle is that all administration expenses fall on residue. It is true that in *In re Bentley. Public Trustee* v. *Bentley* (1) Astbury J. took the opposite view, but that case is reported very shortly, and it is contrary to his decision in *In re Hicklin.* (2) In *In re Sir Edward Hulton, Bt.* (3), Clauson J. held that the fee payable to a Trust Company in respect of an annuity should be treated as an administration expense and ought to be borne out of the income of the residuary estate, after providing for the annuity. The same reasoning applies here. There is nothing in the Public Trustee Act to the contrary.

Vaisey K.C. and *G. R. Upjohn* for several residuary legatees. This case falls directly within *In re Bentley.* (1) There Astbury J. held that the income fee payable to the Public Trustee in respect of the life annuities bequeathed by a will is payable out of those annuities and not out of residue. There is nothing to differentiate that case from the present one.

(1) [1914] 2 Ch. 456.

(2) [1917] 2 Ch. 278.

(3) Since reported p. 536, ante.

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RIDDELL, *In re.* PUBLIC TRUSTEE *v.* RIDDELL.

Cyril Radcliffe K.C. and *G. D. Johnston* for other residuary legatees. The Public Trustee (Fees) Order, 1926 ([1926] W. N. 32), provides by inference that the income fee should come out of the income collected.

Manning K.C. and *C. R. Richmount*, *C. R. R. Romer*, *J. L. Stone*, and *Miss Haskell* for other parties.

Andrewes-Uthwatt for the Attorney-General.

FARWELL J. The question which I have now to decide is whether the Public Trustee's income fee or any part thereof is payable out of the annuities. The Public Trustee is entitled under s. 9 of the Public Trustee Act, 1906, to charge and be paid a fee calculated upon the capital, and he is also entitled to an income fee calculated on the income of the estate. These payments are, in my judgment, part of the expenses of administration, and must be paid out of the income or capital of the estate as a whole before there can be any distribution to the beneficiaries. In the case of the income fee, it must be paid out of the income of the estate and I can see no ground for suggesting that the annuities should bear any part of it. It has been pointed out to me that Astbury J. in *In re Bentley* (1) seems to have come to a different conclusion. With the greatest possible respect for that learned judge, I am unable to take the same view as he did on the matter. The judgment in *In re Bentley* (1) is very shortly reported, and it may be that there were in that case other considerations which do not appear in the report that led him to the conclusion to which he came; but as reported I am unable to agree with the learned judge's decision. It is not binding upon me, and I must very respectfully differ from it. I therefore propose to declare that no part of the income fee of the Public Trustee is payable out of the annuities.

Solicitors: *Smith, Rundell, Dods & Bockett*; *Hurford & Taylor*; *Hyde, Mahon & Pascall*; *W. F. Gillham*; *Canter, Hellyar & Co.*; *Shaen, Roscoe, Massey & Co.*; *The Treasury Solicitor.*

P. J. B.

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(1) [1914] 2 Ch. 456.

FARWELL
J.
1936
July 9.

In re HEPWORTH.
RASTALL *v.* HEPWORTH.

[1936. H. 954.]

Legitimacy—Person born illegitimate—Subsequent legitimation—Cannot take under will of testator dying before date of legitimation—Legitimacy Act, 1926 (16 & 17 *Geo.* 5, *c.* 60), *s.* 1, *sub-ss.* 1, 3; *s.* 3, *sub-s.* 1; *s.* 10, *sub-s.* 2; *s.* 11.

A person born illegitimate, but subsequently legitimated, cannot take under the will of a testator dying before the date of the legitimation, if he or she would not have been entitled to take apart from the legitimation.

The date when the "disposition" comes into operation within the meaning of s. 3, sub-s. 1 (*b*), and s. 10, sub-s. 2, of the Legitimacy Act, 1926, is the date of the death of the testator and not the date when some benefit under the will becomes vested or payable.

ADJOURNED SUMMONS.

The testator, by his will dated March 27, 1918, appointed executors and trustees and, after making certain provisions for his wife, including an annuity, and giving an annuity to a granddaughter, devised and bequeathed to his trustees his real and residuary personal estate upon trust for sale and conversion, with power of postponement, upon trust for all or any his children, except his son, W. E. T. Hepworth, who being male should attain the age of twenty-one years, or being female should attain that age or marry and if more than one in equal shares as tenants in common. He also directed that his trustees should retain each such original share and hold it upon certain trusts therein declared during the life of such child, and after the death of such child as to the capital of such original share for the children or remoter issue of such child as such child should by deed or will appoint, and in default of and subject to any such appointment, in trust for the children or child of such child living at the death of the survivor of him the testator and such child and the children then living of any then deceased child of such child of the testator who should attain the age of twenty-one years as tenants in common, but so that the children of any deceased child of such child of the testator should take equally between them the share which their parent would have taken, if he or she had survived the testator and such child of the testator and attained a vested interest. The testator died on September 23, 1922.

On August 31, 1915, Percival W. G. Hepworth, a son of the testator, married the mother of the first defendant, Olive J. Hepworth, who was born on January 26, 1915, and who was therefore legitimated by virtue of s. 1, sub-s. 1, of the Legitimacy Act, 1926, on January 1, 1927. There was issue of the marriage, the three infant defendants. P. W. G. Hepworth died in 1928 intestate and without having exercised the power of appointment given to him by the testator's will.

This summons was taken out by the trustees of the will, and it asked (inter alia) whether upon the true construction of the will and in the events which had happened the defendant, Olive J. Hepworth, was, as a child of the testator's son, P. W. G. Hepworth, entitled to a share of the testator's residuary estate settled on her father and his issue.

The defendant F. G. Bowden was a daughter, and the defendant M. M. H. Bowden a granddaughter of the testator.

J. M. Paterson for plaintiffs.

Roger Turnbull for first defendant. The question turns on the meaning of the word " disposition " in s. 3, sub-s. 1 (*b*), of the Legitimacy Act, 1926. That sub-section read in conjunction with the interpretation given to " disposition " in s. 11, where it is said to mean an " assurance," shows that the will is not the " disposition." " Assurance " has a very wide meaning. The two sections read together mean as applied to this case that no " disposition " came into operation until the death of the tenant for life in 1928, when the first defendant was legitimate. Neither she nor the other remaindermen could benefit until the death of the tenant for life and could have no interest until that date.

C. D. Myles for the infant defendants. The " disposition " in this case came into operation on the death of the testator. It was an " assurance " of an interest under the will. Therefore the rights of the first defendant are not affected by s. 10, sub-s. 2.

Neville Gray for the daughter and granddaughter of the

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testator. Under s. 1, sub-s. 1, of the Act the date of legitimation is from the coming into force of the Act or from the date of the marriage of the parents, whichever last happens. In this case the first defendant was legitimated on the coming into force of the Act, January 1, 1927. The "disposition" is the will and the material date is the death of the testator. The first defendant cannot take under the will.

FARWELL J. The answer to the first question which I have to determine depends on the construction to be put upon the Legitimacy Act of 1926. The question arises in the administration of the estate of one John William Hepworth, who made his will on March 27, 1918, and died on September 23, 1922, and in this way: the testator had six children, but one of them is expressly omitted from the will, so that the residuary estate is divisible into fifths. One of those children was a son called Percival; Percival married Edith his wife on August 31, 1915, but after the birth of his daughter, the first defendant, she being born on January 26, 1915. The father, Percival, died in October of 1928 without having exercised the power of appointment given to him by the will, and thereupon the one-fifth share of the residuary estate became distributable equally among his children who lived to attain a vested interest.

Under those circumstances is this defendant entitled to participate with the other children of Percival in this portion of the estate? It is quite plain that, apart from the Legitimacy Act of 1926, the first defendant could have no such claim, because it is well settled that prima facie a gift to a child or children means legitimate children, and none other; therefore, although no doubt the lady in question has now become a legitimate child, or a legitimated child, of her father and mother, if that Act had not been passed she could not have taken at all; and, if she is to come in as one of the children of the son, it must be by virtue of the Act and by nothing else. The Act is the Legitimacy Act of 1926. It is entitled: "An Act to amend the law relating to children born out of wedlock"; and the date of the Act, that is the date at which it received the Royal Assent, is December 15, 1926; the Act came into operation on January 1, 1927. Sect. 1, sub-s. 1, provides: "Subject to the provisions of this section, where the parents of an illegitimate person marry or have married one another, whether before or after the commencement of this Act, the marriage shall, if the father of the illegitimate person was or is at the date of the marriage domiciled in England or Wales, render that person, if living, legitimate from the commencement of this Act, or from the date of the marriage, whichever last happens." Pausing there, it is not suggested in this case that the father of the children in question was not domiciled in England or Wales, but it is material to notice that the earliest possible date at which a person under this Act could become legitimated is the commencement of the Act itself, because it is either the commencement of the Act or the date of the marriage, whichever last happens; and if the marriage takes place after the date of the Act, then the date of the marriage is the material date; if the marriage takes place before the Act comes into force, then the earliest date would be January 1, 1927. Then, sub-s. 3 provides: "The legitimation of a person under this Act does not enable him or his spouse, children or remoter issue to take any interest in real or personal property save as is hereinafter in this Act expressly provided." I need not read s. 2, but s. 3, sub-s. 1, provides: "Subject to the provisions of this Act, a legitimated person and his spouse, children or more remote issue shall be entitled to take any interest (*a*) in the estate of an intestate dying after the date of legitimation; (*b*) under any disposition coming into operation after the date of legitimation; (*c*) by descent under an entailed interest created after the date of legitimation; in like manner as if the legitimated person had been born legitimate." I need not refer to any other sections until I come to s. 10, sub-s. 2. That provides: "Nothing in this Act shall affect the operation or construction of any disposition coming into operation before the commencement of this Act, or affect any rights under the intestacy of a person dying before the commence-

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ment of this Act." Then finally, and in some ways the most important for this purpose, is the definition section, s. 11. That section defines the expression "disposition" in the following way: "The expression 'disposition' means an assurance of any interest in property by any instrument whether inter vivos or by will." It is to be noted that the testator in this case died in 1922, and therefore, if the disposition in this case is the will of the testator, this lady cannot participate because the disposition was a disposition which came into operation before the date of the legitimation. I have been invited by Mr. Turnbull to say that that is not the true construction of the Act and that there is no "disposition" until the benefit given to the legitimated person becomes vested. He says in this case that until the death of Percival the gift to the children was contingent, and no one could say who would benefit, and that accordingly, until the father died, there was no disposition to this daughter or any other child of Percival, and accordingly the disposition in this case means the death of Percival, the father. I feel some sympathy with the first defendant, and I have listened with much interest to the very ingenious argument which Mr. Turnbull has submitted to me; but I am quite unable to accept it. In my judgment the disposition in this case is the will of the testator. It cannot have been intended by the Act that the date of the disposition should depend upon the time at which some benefit given to a beneficiary becomes payable, or ceases to be contingent and becomes vested. The assurance here is an assurance by will, and in my judgment it is impossible to read this definition clause as meaning that the disposition is not the will of the testator, but the moment of time (and it may be various moments of time) at which the benefits given under the will become vested. In my judgment the material date here is the death of the testator, and since the lady was not then entitled to any interest under the will she is not now entitled to participate.

Solicitors: *Herbert G. Rastall & Jones; Maddison, Stirling, Humm & Willett; Vizard, Oldham, Crowder & Cash.*

P. J. B.

In re SHARMAN'S CONTRACT.

FARWELL
J.

1936
July 10.

[1936. S. 1454.]

Vendor and purchaser—Conveyance—Plan.

Where on the sale and purchase of land the description in the contract affords a sufficient and satisfactory identification of the property sold without a plan, the purchaser cannot require, at the expense of the vendor, a plan to supplement the description.

SUMMONS.

This was a summons taken out by the purchaser against the vendor under a contract dated March 4, 1936, whereby the vendor agreed to sell and the purchaser agreed to buy a house at Brighton, and it asked for "a declaration that in the conveyance of the property to the purchaser she is entitled to have the same described by reference to a plan, such plan being expressed to be for the purpose of identification only and not by way of limitation or extension of grant." By that contract the respondent agreed to sell and the applicant agreed to purchase "The freehold property shortly described in the first schedule hereto for an estate in fee simple absolute in possession free from incumbrance except as hereinafter mentioned" at a certain price. In the first schedule the property was described as "all that messuage or dwelling-house situate and being Number 27 Norfolk Square, Brighton, in the County of Sussex." No. 27 Norfolk Square stood in a row of houses and consisted of a dwelling-house, with forecourt and a small yard in the rear. The agreement having been entered into, the matter proceeded in the ordinary way and the purchaser investigated the title. Finally a draft conveyance was prepared, and it provided that "The vendor . . . . hereby conveys unto the purchaser all that piece or parcel of land situate in the County Borough of Brighton and on the east side of Norfolk Square together with the messuage or dwelling-house erected thereon or on some part thereof and known as 27 Norfolk Square Brighton aforesaid as the same is for the purpose of identification only and not by way of limitation or extension of grant more particularly delineated and described in the plan drawn hereon and thereon coloured pink." The plan was a tracing from the Ordnance Survey and showed the property proposed to be sold coloured pink. The vendor objected to that description and in particular to a plan being annexed to the conveyance, on the ground that he could not agree to a plan although it was only for the purpose of identification and not by way of limitation or extension of grant, unless he had it checked and verified by his own surveyor, and that would put him to unnecessary expense, and he would only agree to have a plan if the purchaser was willing to pay whatever expense he might incur in employing his surveyor to check it. He suggested that the description of the property should be as follows: "All that piece or parcel of land situate and being in the County Borough of Brighton, bounded on the west by Norfolk Square, on the north by No. 28 Norfolk Square, on the east by No. 30 Norfolk Square, and on the south by No. 26 Norfolk Square, together with the messuage or dwelling-house erected thereon or on some part thereof and known as 27 Norfolk Square." The vendor claimed that that was a sufficient description to identify beyond all reasonable doubt the property which was the subject-matter of the contract. Some correspondence ensued, but, the parties being unable to agree, this summons was taken out by the purchaser.

Raymond Jennings for the applicant. On the authorities the purchaser is entitled to a plan; it is essential that the property sold and its boundaries should be shown. In *In re Sansom and Narbeth's Contract* (1) Swinfen Eady J. held that a purchaser is entitled to have land conveyed to him by reference to a plan on his conveyance, and in *In re Sparrow and James' Contract* (2) Farwell J. held that it was only in special circumstances that a vendor is not required to supply a plan. There are no special circumstances in this case, and the applicant is entitled to the declaration asked for by the summons.

(1) [1910] 1 Ch. 741. (2) [1910] 2 Ch. 60.

Montgomery White for the respondent. A purchaser is only entitled to have in his conveyance such a description of the property sold as would be sufficient to identify it. The law is accurately set out in Williams on Vendor and Purchaser, 4th ed., pp. 651–2, and in dealing with the judgment of Swinfen Eady J. in *In re Sansom and Narbeth's Contract* (1) the learned author says: "It is respectfully submitted that this pronouncement is unsatisfactory in principle." Then in dealing with the judgment of Farwell J. in *In re Sparrow and James' Contract* (2) he says: "It seems to be implied . . . . that no plan can be required where the description in the contract affords a sufficient and satisfactory identification of the land sold." Here the description in the contract affords a sufficient and satisfactory identification of the land sold, without the aid of a plan, and the purchaser is not entitled to the relief which she asks for.

Jennings in reply. The limitations put on the authorities in Williams on Vendor and Purchaser are not justified. The judgment of Swinfen Eady J. in *In re Sansom and Narbeth's Contract* (1) is the only real test of principle in a case like this.

FARWELL J. The question I have to decide is whether the purchaser is entitled to insist that the conveyance should be by way of plan, expressed to be for the purpose of identification only and not by way of limitation or extension of grant, even although to have the property so conveyed may involve the vendor in some expense. This seems, in this case, to be a trivial matter and one that might very easily have been dealt with by the parties without the necessity and the expense of these proceedings; but it may be that in other cases the provision of a plan may involve considerable expense, and this case may therefore be of some general importance. It is said, as a result of the decision of Swinfen Eady J. in *In re Sansom and Narbeth's Contract* (1), that the purchaser is so entitled. From the headnote in that case it would appear that Swinfen Eady J. decided that in all simple cases a purchaser is entitled as of right to have land conveyed to him by reference to a plan on the conveyance. In my judgment, the headnote as set out in the report is not quite accurate. The learned judge at the end of his judgment, summing up the conclusion to which he came, said this (1): " It will be sufficient for the determination of the present case to hold that in this case and in ordinary simple cases the purchaser, as part of the rule that he is entitled to take the conveyance in his own form, is entitled to have a plan upon the conveyance, and is entitled to a conveyance by reference to that plan. It follows, therefore, that in this case the purchaser is right, and the costs will follow the event." In my judgment, the learned judge did not intend to lay down as a hard and fast rule that in every simple case it was the right of a purchaser to have the property conveyed by reference to a plan although no doubt generally speaking that may be so, since it may be that that is the most satisfactory way of identifying the property in the majority of such cases. In my judgment the law on this matter is correctly stated in Williams on Vendor and Purchaser, 4th ed., p. 651: " With respect to the parcels or description of the property sold, the purchaser is entitled to have inserted in the conveyance such a description of the property sold as will clearly identify the land intended to be assured. If, therefore, the description of the property sold contained in the contract is misleading, inadequate or obsolete, the purchaser should insert in the draft conveyance an accurate description of the land, according to its present condition, prepared from his own surveyor's report; and it is thought that in these circumstances the vendor could not refuse to convey the land by the new description." On p. 652 there is this statement: " The important question, in what cases is the purchaser entitled to have the property conveyed by reference to a plan, can only rightly be solved by applying these principles." Then the learned author refers to the judgments of Farwell J. in *In re Sparrow and James' Contract* (2) and Swinfen Eady J. in *In re Sansom and Narbeth's Contract* (3), and he ends by saying: " It is respectfully submitted that this pronouncement is unsatisfactory"—that is the pronouncement of Swinfen Eady J.—" in principle; and that a sounder rule is suggested in the judgment of Farwell J., viz., that, where the description in the contract is without a plan insufficient to identify the property sold, the purchaser may require it to be supplemented by a plan. It seems to be implied from this that no plan can be required where the description in the contract affords a sufficient and satisfactory identification of the land sold."

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(1) [1910] 1 Ch. 741.

(2) [1910] 2 Ch. 60.

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(1) [1910] 1 Ch. 750.

(2) [1910] 2 Ch. 60.

(3) [1910] 1 Ch. 741.

In my judgment, except that I think that the learned author treats the decision of Swinfen Eady J. as going further than I think it was intended to go, the statement which I have read is an accurate statement of the law. The duty of the vendor is to convey the property under a description which is a sufficient and satisfactory identification of the land sold, and no doubt in many cases the most satisfactory and sufficient method of doing that is to do it by means of a plan. If, in order that there shall be a sufficient and satisfactory identification of the land sold, a plan is necessary, then beyond all doubt, in my view, the vendor is bound to convey the land by reference to a plan. But, in my judgment, if it is possible to convey the property by a sufficient and satisfactory identification without a plan, and if the use of a plan throws upon the vendor an expense which is not necessary, because the plan itself is not necessary, then it is not right to say that a purchaser can insist upon a vendor going to that additional and unnecessary expense.

In my judgment, Swinfen Eady J. really meant no more in *Sansom's* Case (1) than this: That in most simple cases the best method of conveying property for the purpose of giving a sufficient and satisfactory identification is by means of a plan and that, therefore, generally, a plan is necessary. But, in my judgment, the learned judge did not intend to go beyond what is, as I understand it, quite well settled now as the duty of a vendor—namely, to convey by way of sufficient and satisfactory identification. If he can do that without a plan, then he has done all that he can be called

(1) [1910] 1 Ch. 741.

FARWELL J.
1936
SHARMAN'S CONTRACT, *In re.*

upon to do, and if the purchaser insists upon a plan, then, in my view, the plan can only be provided at the expense of the purchaser. The vendor is not, in my judgment, bound to go to the extra expense of a plan unless it is necessary to enable him to fulfil his obligation of conveying the property under a description which is a sufficient and satisfactory identification of it.

If that be the true view of the law, I have then to consider whether this is a case in which a plan is necessary for the purpose of identifying and properly describing the property. This property is a house with a forecourt and a small court in the rear ; it is one of a row of houses in a street in Brighton. In my judgment, there can really be no question at all but that the description which the vendor proposed should be inserted in the conveyance, that is : " All that piece or parcel of land situate and being in the County Borough of Brighton, bounded on the west by Norfolk Square, on the north by No. 28 Norfolk Square, on the east by No. 30 Norfolk Square and on the south by No. 26 Norfolk Square together with the messuage or dwelling-house erected thereon or on some part thereof and known as No. 27 Norfolk Square," is perfectly ample and sufficient description to identify the property and no plan is a necessary part of such identification. If that be so, and if I have rightly stated the law, it follows that the purchaser in this case was not entitled to require the vendor to agree to a plan, because the vendor could not be expected to agree to a plan which he had not had checked and verified by his own surveyor, and to do that would involve him in some expense which, in my view, was an expense which he was not bound to incur.

In those circumstances the applicant in this case is not entitled to the relief which she seeks.

Solicitors for the applicant : *Blyth, Dutton, Hartley & Blyth, for Graham-Hooper & Betteridge, Brighton.*

Solicitors for the respondent : *Boxall & Boxall, for Edwin Boxall & Kempe, Brighton.*

P. J. B.

END OF VOL. AND OF CHANCERY SERIES FOR 1936.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1936, will be as follows :—

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